

Oct. 1981

HOBSON V. WILSON

1

VOL. 13

Nov. 1981

(TAKE TO COURT)

- 1 -
- 394 Response by Federal Defendants to Plaintiffs' First Request for Admissions, To All Federal Defendants
- 395 Motion to Compel Production of Documents and for Sanctions (WINKLEMAN)
- 396 Motion for Modified Pretrial Schedule, Status Call, and Outstanding Discovery Matters
- 397 Notices of Filing
- 398 Motion for Reconsideration
- 399 ORDER granting federal Ds motion to file pretrial brief one day out of time
- 400 ORDER granting Ps' motion for voluntary dismissal of certain federal Ds, and dismissing Ps' claims against certain Ds without prejudice
- 401 MEMORANDUM by federal Ds in opposition to Ps' Motion For Reconsideration and in response to the Court's order of 10/21/81
- 402 RESPONSE of D.C. Ds to Ps' Memorandum regarding fraudulent concealment
- 403 Ps' Statement regarding Ds' exhibits
- 404 MOTION IN LIMINE
- 405 Plaintiffs' list of exhibits
- 406 Ps' SUPPLEMENTAL MEMORANDUM in response to Order dated 10/29/81
- 407 Ps' list of witnesses
- 2 -
- 408 MOTION for separate trial of claims against D Jones and motion to withdraw as counsel for D. Jones
- 409 MOTION by D. Jones for reconsideration of Order of 10/29/81
- 410 Notice of filing (Grimaldi and Shackelford depositions)

- 349 Motion by D Kelly for Judgment on the Pleadings
- 350 Motion by D Krebs for Judgment on the Pleadings
- 351 Motion by D Kunkel for Judgment on the Pleadings
- 352 Motion by D Lamberth for Judgment on the Pleadings
- 353 Motion by D O'Connor for Judgment on the Pleadings
- 354 Motion by D Pangburn for Judgment on the Pleadings
- 355 Motion by D Rarity for Judgment on the Pleadings
- 356 Motion by D Sawyer for Judgment on the Pleadings
- 357 Motion by D Stanley for Judgment on the Pleadings
- 358 Motion by D Yates for Judgment on the Pleadings
- 359 Motion by Federal Defendants for Judgment on the Pleadings
- 360 Motion to Extend Time in which to File Opposition to Motion for Summary Judgment
- 361 Order to Extend Time for Plaintiffs to File Opposition to Federal Defendants' Motions for Summary Judgment
- 3- (362) Opposition to Motions by Ds Brennan, Moore, Grimaldi, Pangburn, Jones, and Webster for Judgment on the Pleadings
- 363 Motion for Leave for Voluntary Dismissal of Certain Federal Defendants
- * 364 Answers of D District of Columbia to P's thirteenth set of Interrogatories
- * 365 Answers of D Districe of Columbia to P's fourteenth set of Interrogatories
- * 366 Memorandum by Federal Defendants in Response to Motion for Voluntary Dismissal of Certain Federal Defendants
- * 367 Reply Memorandum in Support of Motion by D Cortland J. Jones to Dismiss
- 368 ^{for hearing on motions} Order to Compel Responses to Interrogatories and document Requests directed to Federal and D.C. Defendants
- * 369 Motion of D.C. Ds for an Extension of time in which to Respond to P's thirteenth and fourteents sets of Interrogatories
- 370 Renewal of Oral Motion for Order Compelling Discovery
- 371 Notice of Filing

- 372 Motion for Expedited Response to Requests for Admission
- 373 Fresh Motion To Compel Answers To Plaintiffs' 13th and 14th Sets of Interrogatories, to Defendant District of Columbia
- 374 Notice of Filing
- 375 Notice of Filing
- 376 Plaintiffs' Motion for Leave to File Pre-Trial Brief One Day Out of Time

4- 377 Plaintiffs' Pretrial Brief

- 378 Motion by Federal Defendants for Enlargement of Time Within Which to File Pre-Trial Brief
- 379 Motion of District of Columbia Defendants for an Extension of Time Within Which to Respond To Plaintiffs' Pretrial Brief

5- 380 Pre-Trial Brief of District of Columbia Defendants and Exhibits, Jury Instructions, and Proposed Voir Dire Questions

- 381 Plaintiffs' First Request for Admissions To All Federal Defendants
- 382 Motion to Compel Production of Documents Not Produced by Defendant District of Columbia
- 383 Plaintiffs' Second Request for Admissions to all District of Columbia Defendants
- 384 D.C. Defendants' Response to Plaintiffs' Second Request for Admissions
- 385 Reply Memorandum in Support of Motion by Federal Defendants for Judgment on the Pleadings and Motion by Defendant Pangburn For Judgment on the Pleadings

6- 386 Orders of October 29, 1981:

-Ordered that Defendants Shall Respond to Plaintiffs' first and second requests for admissions simultaneously with service of Defendants' pre-trial brief

-Memorandum and Order re: fraudulent concealment Jones

- 387 Order granting Enlargement of Time in which to file pre-trial brief to Federal Defendants
- 388 Order Granting Plaintiffs' motion to file pre-trial brief out of time
- 389 Order Granting D.C. Defendants' Motion for extension of time, and granting D.C. Defendants until Nov. 3 to respond to Plaintiffs' pre-trial brief
- 390 Order that the District of Columbia shall produce Index referred to in response 8 to Plaintiffs' 13th set of interrogatories
- 391 Motion for Leave to file Memorandum in Response to Order Dated October 29, 1981, one day out of time
- 392 Motion by Federal Defendants for Leave to File Pre-Trial Brief out of time

7- 393 Pre-Trial Brief of Federal Defendants

inc. proposed jury instructions
+ voir dire.
proposed verdict form +
whitlist list

Digitized by the Internet Archive
in 2025 with funding from

Digitization funded by a generous grant from the National Endowment for the Humanities.

Jones Last Motion for
Separate Trial

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
_____)	

CERTIFICATE OF DAVID H. WHITE

As directed by Rule 1-4(c)(2) of the Rules of the United States District Court for the District of Columbia, David H. White states as follows:

1. The present address of Courtland J. Jones is

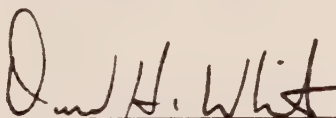
6607 North 29th Street
Arlington, Virginia 22213

2. On November 16, 1981, I spoke to Mr. Jones and explained to him that I would be moving to withdraw as his attorney in this civil action. I also explained to him the grounds for this motion, and he advised me that he would retain private counsel to represent his interests in connection with the motion to withdraw.

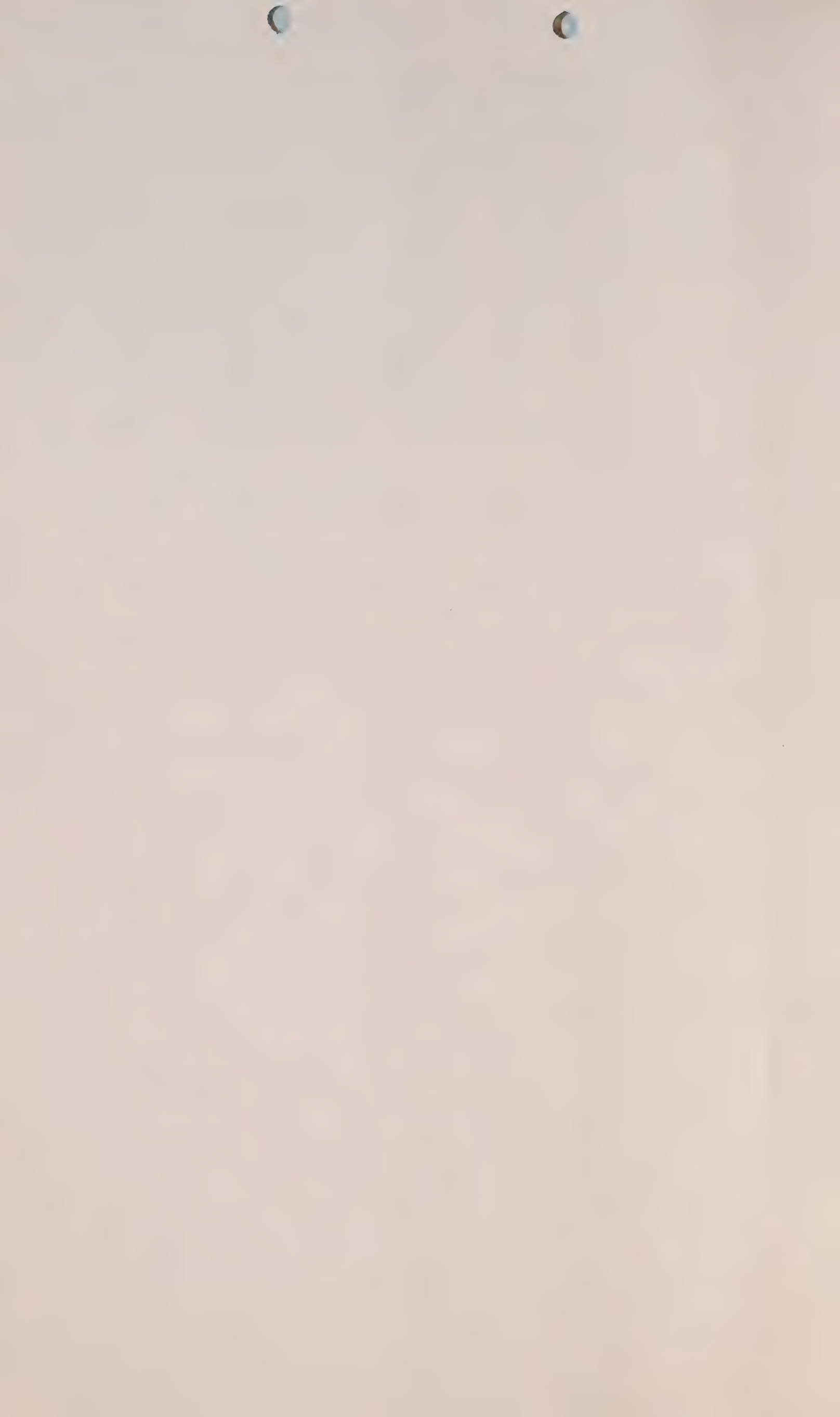
3. On November 17, 1981, I spoke with attorney Brian P. Gettings, 1400 N. Uhle, Arlington, Virginia, who is admitted to practice in the District of Columbia. Mr. Gettings has been retained by Mr. Jones, and he advised me that Mr. Jones will not oppose the motion to withdraw or the motion for separate trial.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed On: November 17, 1981



DAVID H. WHITE

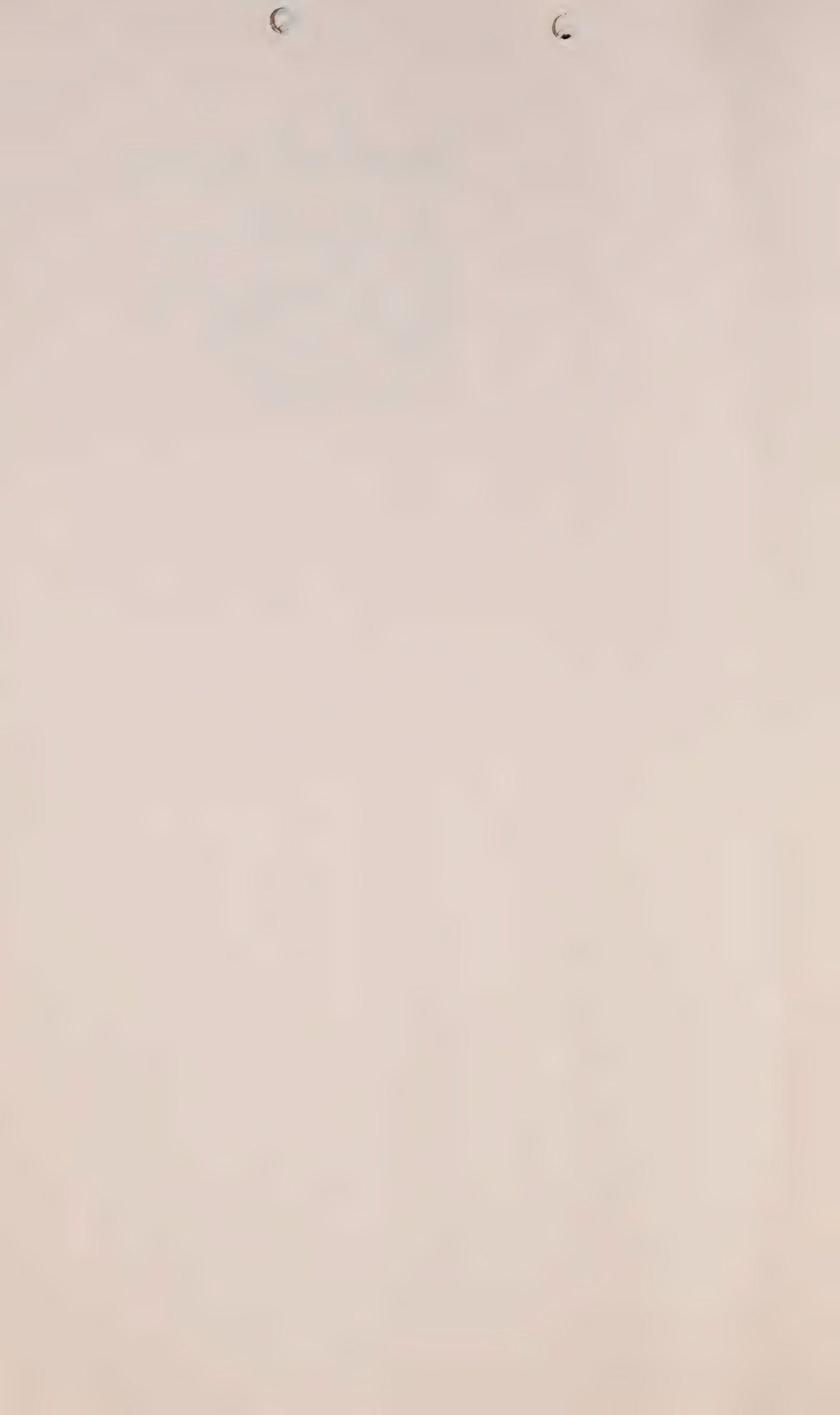


Brook Hedge
BROOK HEDGE

David H. White
DAVID H. WHITE

Attorneys, Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for defendant
Courtland J. Jones



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
)	

MOTION FOR SEPARATE TRIAL OF CLAIMS AGAINST
DEFENDANT COURTLAND J. JONES AND MOTION TO
WITHDRAW AS COUNSEL FOR DEFENDANT COURTLAND J. JONES

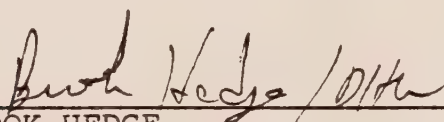
David H. White, pursuant to Rule 42 of the Federal Rules of Civil Procedure and Rule 1-4 of the Rules of this Court, and in the event this Court denies Motion by Defendant Jones for Reconsideration of the Order of October 29, 1981, moves to withdraw as counsel for defendant Courtland J. Jones and further moves for a separate trial of the claims by plaintiffs against defendant Jones.

In support of this motion counsel relies upon the attached memorandum of points and authorities.


Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney



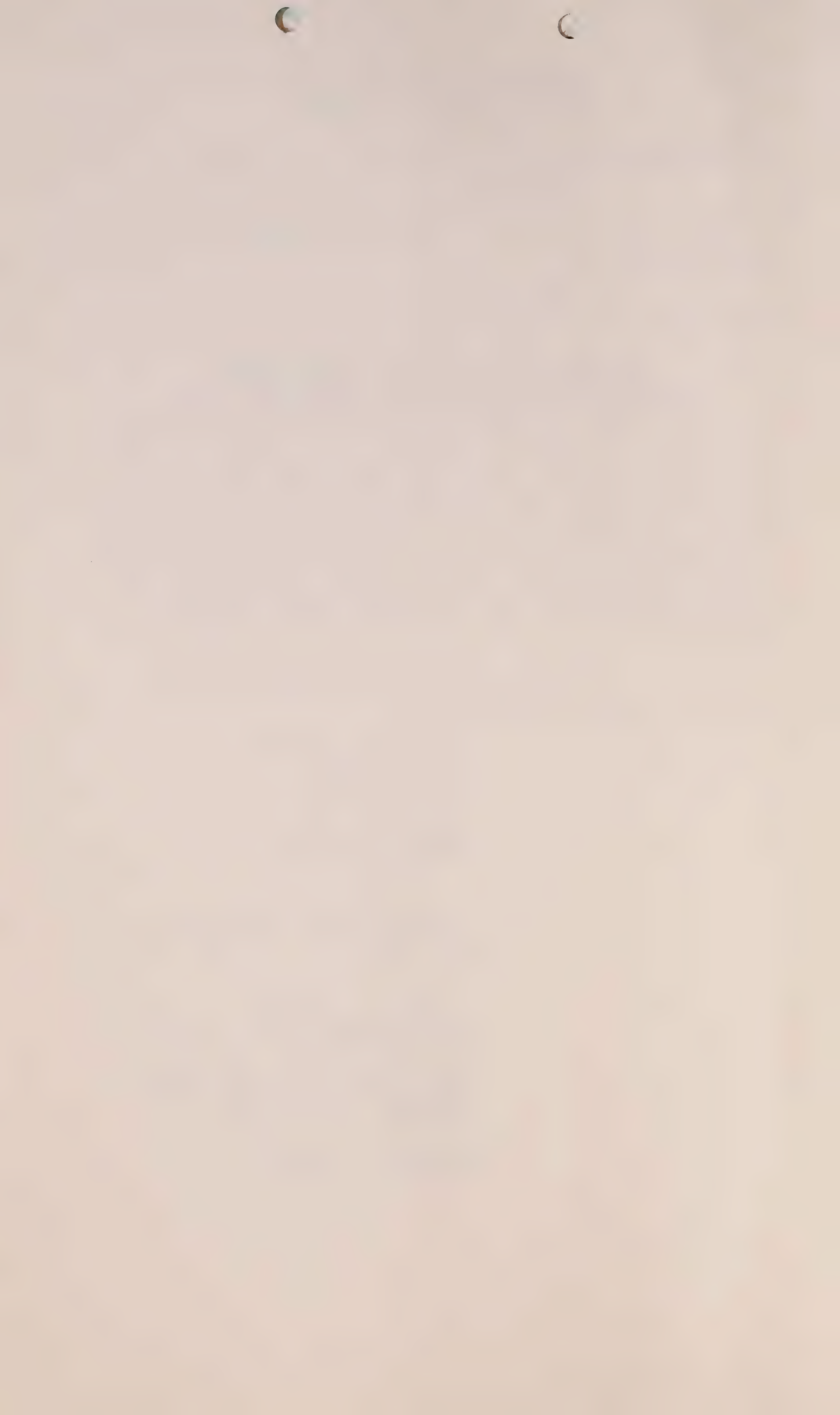
BROOK HEDGE



DAVID H. WHITE

Attorneys, Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for defendant
Courtland J. Jones



CERTIFICATE OF SERVICE

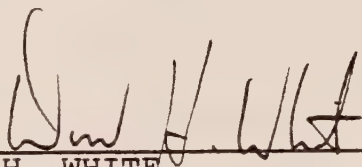
I hereby certify that on this 17th day of November, 1981,
I have served upon each counsel, by mailing postage prepaid, one
copy of the foregoing MOTION FOR SEPARATE TRIAL OF CLAIMS AGAINST
DEFENDANT COURTLAND J. JONES AND MOTION TO WITHDRAW AS COUNSEL FOR
DEFENDANT COURTLAND J. JONES, accompanying memorandum of points
and authorities in support, and proposed ORDER.

Herb Semmel, Esquire
Urban Law Institute for the
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009

Anne Pilsbury, Esquire
17 Danforth Street
Norway, Maine 04268

Laura Bonn, Esquire
Assistant Corporation Counsel
District Building
14th and E Streets, N.W.
Washington, D.C. 20004

Daniel Schember, Esquire
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
1712 N Streets, N.W.
Washington, D.C. 20036



DAVID H. WHITE
Attorney, Department of Justice
Washington, D.C. 20530



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
)	

MEMORANDUM IN SUPPORT OF MOTION FOR
SEPARATE TRIAL OF CLAIMS AGAINST DEFENDANT
COURTLAND J. JONES AND MOTION TO WITHDRAW AS
COUNSEL FOR DEFENDANT COURTLAND J. JONES

In support of the motion to withdraw as counsel in this action for defendant Courtland J. Jones and for separate trial of the claims by plaintiffs against defendant Jones, the following averments are made:

1. David H. White is an attorney employed by the United States Department of Justice and has represented the various federal defendants in this action since its commencement in July, 1976.

2. Courtland J. Jones was added as a party defendant to this action by the Amended Complaint filed December 7, 1977. In December, 1978, service of process was attempted upon defendant Jones. Pursuant to regulations of the Department of Justice, 28 C.F.R. § 50.15, Mr. Jones requested representation by the Department of Justice. This request was granted and attorney David White undertook representation.

3. By order of November 9, 1979, following motion filed by his counsel, defendant Courtland J. Jones was dismissed from this action.

4. On June 21, 1981, defendant Jones was served with the summons and complaint and directed to answer within 60 days. Pursuant to Department of Justice regulations, he requested and received representation by the Department of Justice.

5. On July 31, 1981, discovery in this action was closed by order of this Court.



6. On August 20, 1981, by way of papers prepared by David H. White, defendant Jones moved to dismiss on grounds that, among other things, plaintiffs had failed to prosecute the action as to him and he was prejudiced by the untimely service of process.

7. On October 29, 1981, this Court denied defendant Jones' motion to dismiss, holding that defendant Jones

" . . . will suffer no prejudice if plaintiffs are precluded from raising any claim against him not stemming from acts already involved in the litigation against other defendants who are represented by Jones' counsel, and who were with Jones in the Federal Bureau of Investigation at the time of his allegedly unlawful conduct." [Emphasis supplied.]

The foregoing demonstrates that the major, if not the sole, reason that defendant Jones was not dismissed from this action is that he is represented by David H. White. The holding of this Court suggests that the knowledge gained by David H. White in representing other defendants in this action dissolves the prejudice suffered by defendant Jones in not being permitted the opportunity to engage in discovery and to pursue his other procedural and legal rights as a litigant. It naturally follows that if defendant Jones had retained private counsel rather than requesting representation by the Justice Department he would have been dismissed from this action. In other words, defendant Jones has been penalized by his choice of counsel so that there exists a conflict between defendant Jones and his present counsel which requires that David H. White be granted leave to withdraw his appearance as counsel for defendant Jones.

Inasmuch as trial of this action is only a few days hence, defendant Jones should be given a separate trial to enable him an opportunity to find and retain other counsel and to give new counsel an opportunity to take appropriate action to protect defendant Jones' interest.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
_____)	

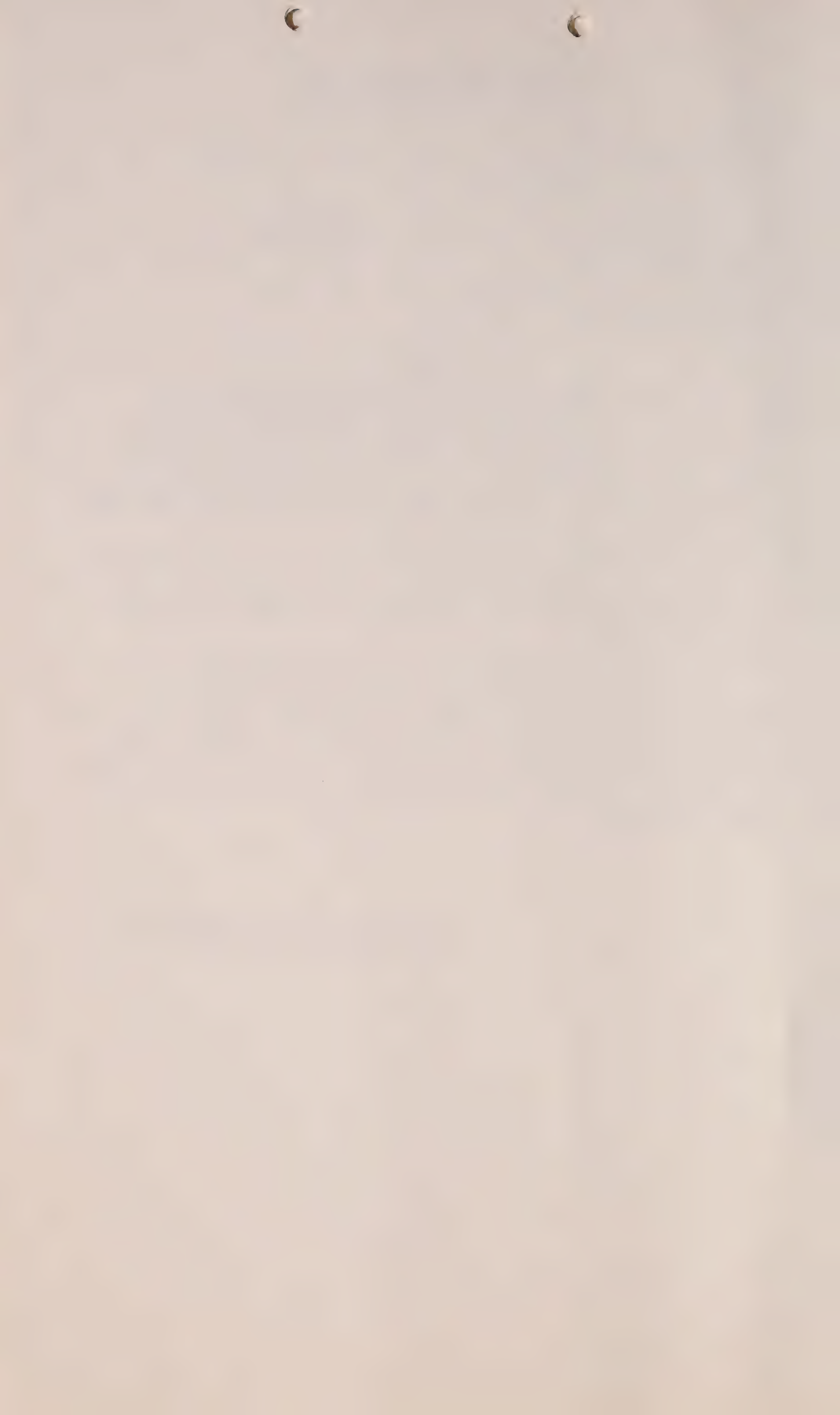
ORDER

This cause having come before the Court on motions by Mr. David H. White to withdraw as counsel for defendant Courtland J. Jones and for a separate trial of the claims by plaintiffs against defendant Jones, and the Court being fully advised in the premises, it is this _____ day of November, 1981:

ORDERED that the motion of David H. White to withdraw as counsel for defendant Courtland J. Jones be, and hereby is, granted; and it is further

ORDERED that the claims against defendant Jones shall be severed from the remaining claims, and the trial of the claims against defendant Jones shall occur on a date to be set by order of this Court following the entry of appearance of new counsel for defendant Jones.

UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
_____)	

MOTION BY DEFENDANT COURTLAND J. JONES
FOR RECONSIDERATION OF THIS COURT'S
ORDER OF OCTOBER 29, 1981

Defendant Courtland J. Jones, through his undersigned counsel,
moves for reconsideration of this Court's Order of October 29,
1981, denying his motion to dismiss.

In support of this motion defendant Jones relies upon the
attached memorandum of points and authorities.

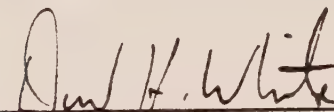
Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney



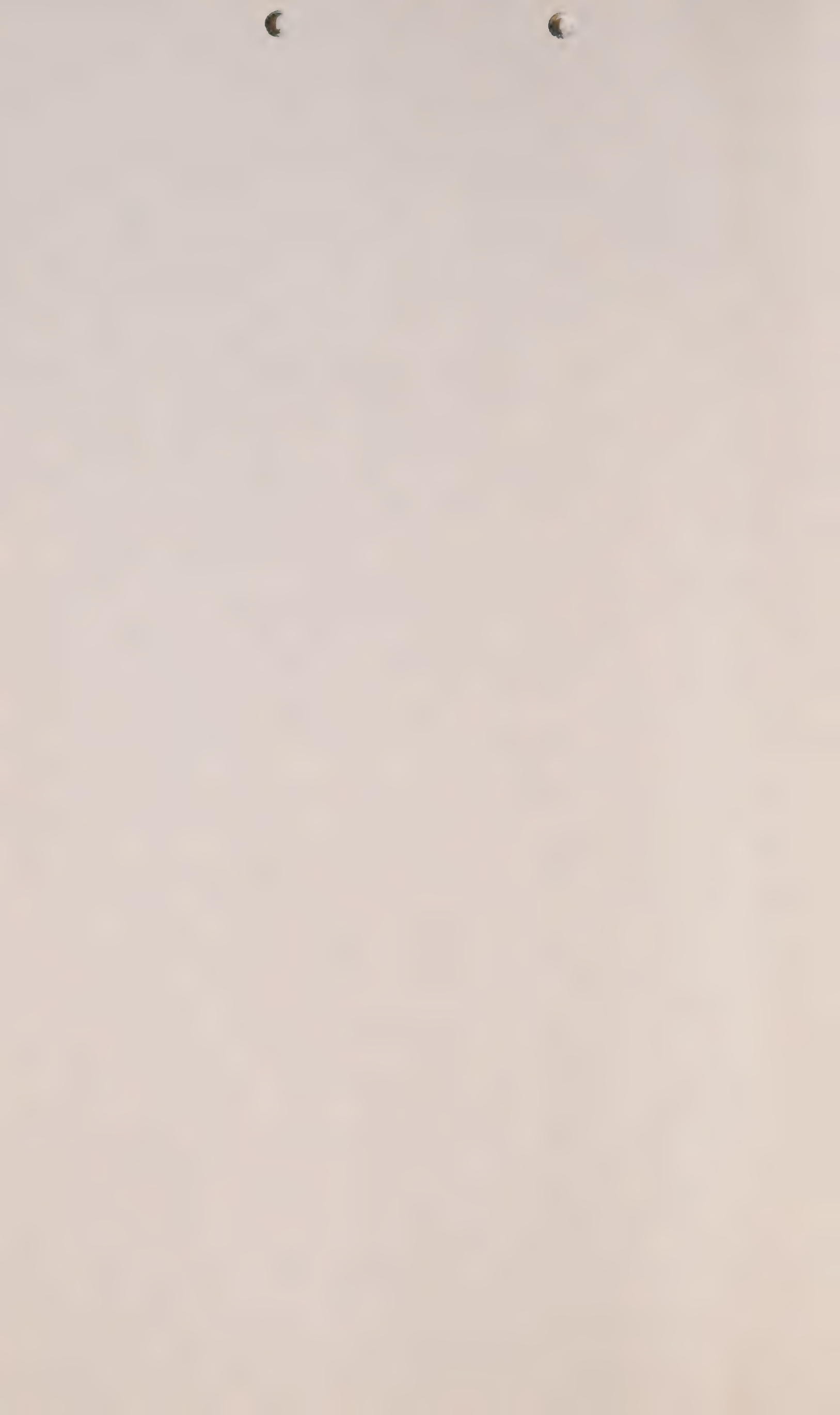
BROOK HEDGE



DAVID H. WHITE

Attorneys, Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for Defendant
Courtland J. Jones



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
_____)	

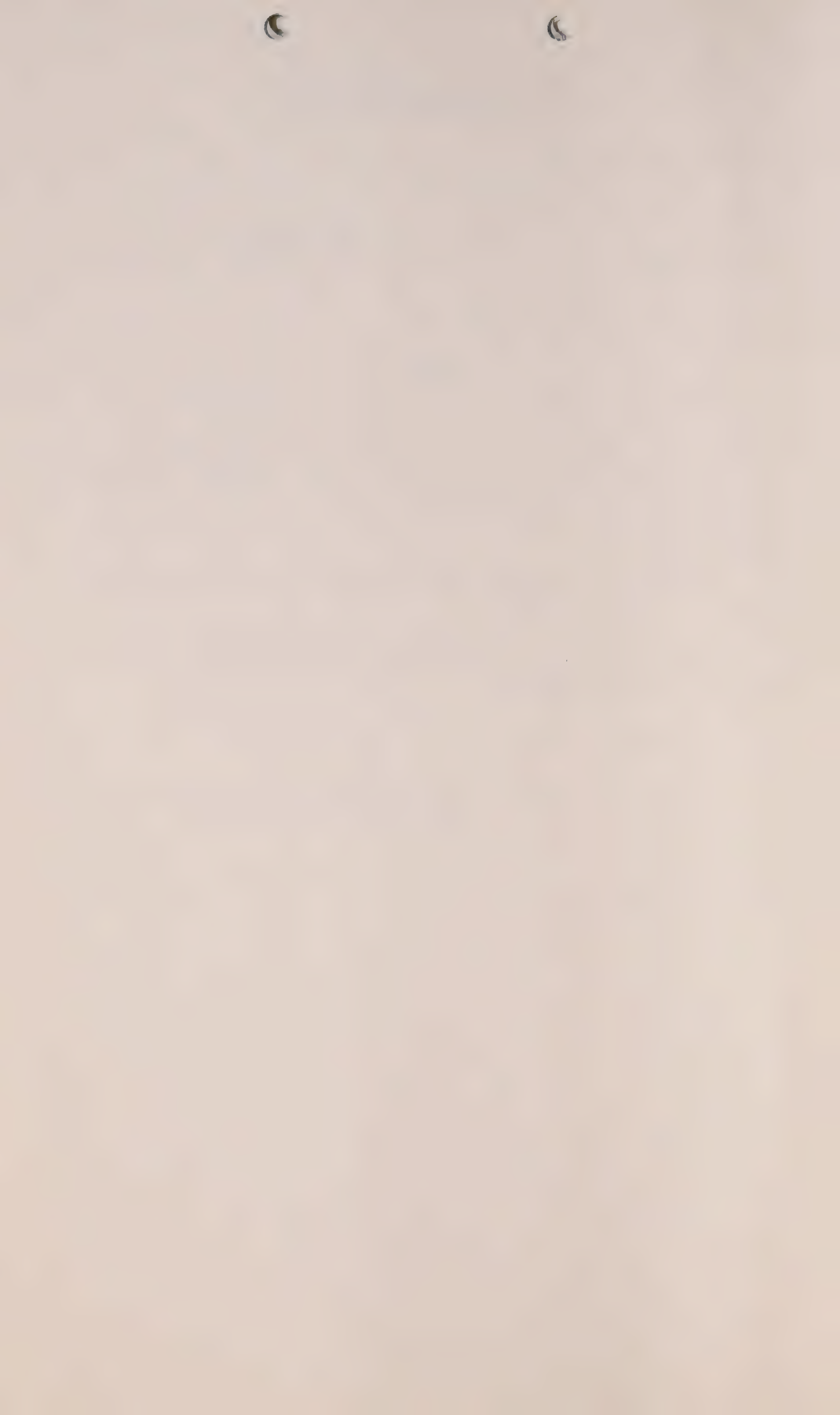
ORDER

This matter having come before this Court on Defendant Courtland J. Jones' motion for reconsideration of this Court's Order of October 29, 1981, denying his motion to dismiss, and the Court being fully advised in the premises, it is this _____ day of November, 1981,

ORDERED that the motion for reconsideration be, and hereby is, granted; and it is further

ORDERED that defendant Courtland J. Jones' motion to dismiss be, and hereby is, granted.

UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
)	

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION BY DEFENDANT COURTLAND J.
JONES FOR RECONSIDERATION OF THIS COURT'S
ORDER OF OCTOBER 29, 1981

This action was commenced on July 16, 1976. By Amended Complaint filed December 7, 1977, Courtland J. Jones was added as a party defendant but was dismissed for insufficiency of service of process by Order of this Court dated November 9, 1979. On June 21, 1981, defendant Jones was served with the Summons and Amended Complaint. He thereafter moved to dismiss on grounds that, among other things, the plaintiffs had failed to prosecute the action as against him and that he had been unfairly prejudiced by plaintiffs' untimely service of process.

On October 29, 1981, this Court denied defendant Jones' motion to dismiss. With regard to the issue of the untimely service of process, the Court held that defendant Jones was not prejudiced "if plaintiffs are precluded from raising any claim against him not stemming from acts already involved in the litigation against other defendants who are represented by Jones' counsel"

The effect of the ruling is that the personal knowledge gained by defendant Jones' attorney in representing other defendants was deemed by the Court to be sufficient to protect defendant Jones' interests and nullified any detriment that would be suffered by deprivation of the opportunity for discovery. It must be noted, however, that during the time following the dismissal in 1979 and prior to service of process upon defendant Jones in June of 1981, counsel for the federal defendants made no discovery demands



relating to plaintiffs' claims against defendant Jones.* / Consequently, prior to filing their Pretrial Brief on October 22, 1981, plaintiffs had not specified in any way the nature of their claims against defendant Jones. The validity of the proposition that the discovery on behalf of the other defendants was sufficient for defendant Jones has not been demonstrated, and plaintiffs have not established that he suffered no prejudice. See Anderson v. Air West, Inc., 542 F.2d 522 (9th Cir. 1976). Plaintiffs have also failed to offer any explanation for their failure to effect timely service of process.

An additional implication of the Court's ruling of October 29, 1981, is that the finding of no prejudice, notwithstanding the egregious delay in service, rests entirely on the personality of defendant Jones' counsel. In other words, if defendant Jones had retained any other attorney, the Court could not have found an absence of prejudice and, presumably, the motion to dismiss would have been granted. There is thus created the unique situation that a defendant's selection of counsel, rather than the merits of the issues, has governed whether he will be put to the risk of being held liable in damages.

Conclusion

Defendant Jones respectfully suggests that the Court's ruling of October 29, 1981, was incorrect and should be reconsidered.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney


BROOK HEDGE

* / Since defendant Jones was dismissed from the action in November, 1979, the undersigned counsel no longer represented any interest of Mr. Jones. When Mr. Jones was served with the Summons and Amended Complaint on June 21, 1981, he again sought representation by the Department of Justice but, of course, was free to choose outside counsel.



DAVID H. WHITE

Attorneys, Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for Defendant
Courtland J. Jones

CERTIFICATE OF SERVICE

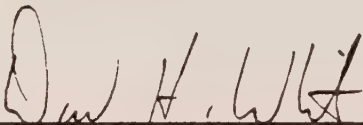
I hereby certify that on this 17th day of November, 1981, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing MOTION BY DEFENDANT COURTLAND J. JONES FOR RECONSIDERATION OF THIS COURT'S ORDER OF OCTOBER 29, 1981, accompanying memorandum of points and authorities in support, and proposed ORDER.

Herb Semmel, Esquire
Urban Law Institute for the
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009

Anne Pilsbury, Esquire
17 Danforth Street
Norway, Maine 04268

Laura Bonn, Esquire
Assistant Corporation Counsel
District Building
14th and E Streets, N.W.
Washington, D.C. 20004

Daniel Schember, Esquire
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
1712 N Streets, N.W.
Washington, D.C. 20036



DAVID H. WHITE
Attorney, Department of Justice
Washington, D.C. 20530

P1fs. Motion to Compel Winkelman
Statements.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)

Plaintiffs,)

v.)

JERRY WILSON, et al.,)

Defendants.)

Civil Action No. 76-1326

MOTION TO COMPEL PRODUCTION
OF DOCUMENTS AND FOR SANCTIONS

Plaintiffs move the Court for an order compelling discovery from deponent Melvin Winkelman of the documents identified in plaintiff's subpoena to him. Plaintiffs also move the Court for sanctions against defendant District of Columbia for failure to comply with the previous court-approved resolution of this matter.

In support of this motion plaintiffs rely on the accompanying memorandum.

Anne Pilsbury

Anne Pilsbury
17 Danforth Street
Norway, Maine 02468
(207) 925-1144

Of Counsel:

Arthur Spitzer
Executive Director
American Civil Liberties
Union Fund of the
National Capital Area
Suite 301
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 544-1076

J. E. McNeil

J. E. McNeil

Daniel M. Schember

Daniel M. Schember
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
Attorneys at Law
1712 N Street, N.W.
Washington, D.C. 20036
(202) 223-9274

Herb Semmel

Herb Semmel
Union Law Institute
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009
(202) 265-9500

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	

MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL PRODUCTION
OF DOCUMENTS AND FOR SANCTIONS

In their subpoena to deponent Melvin Winkelman, plaintiffs directed him to produce documents pertaining to a Metropolitan Police Department internal investigation of alleged wrongdoing by the Department's Intelligence Division. Deponent Winkelman produced no documents and plaintiffs moved to compel their production in open court during the course of the deposition on August 14, 1981.

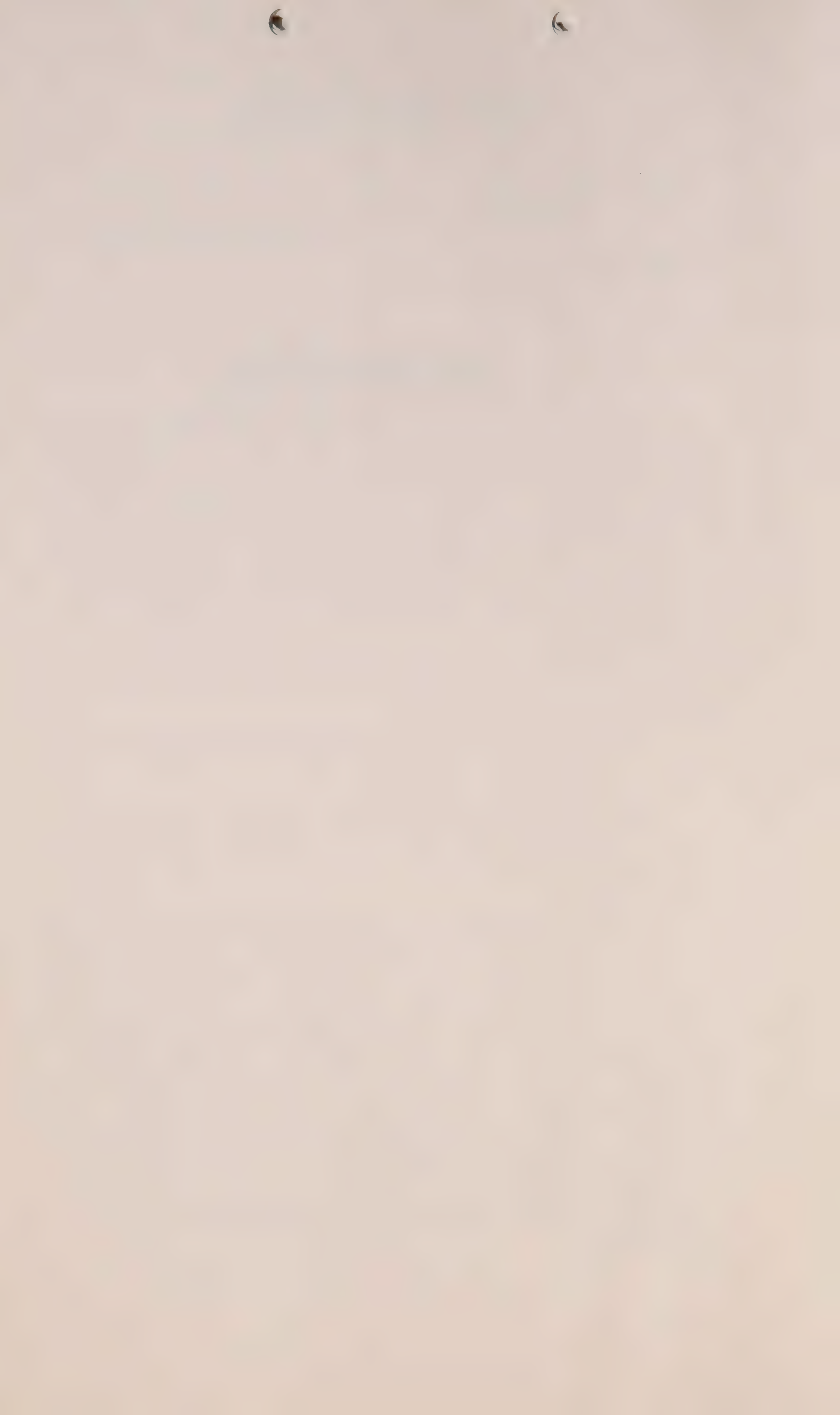
At the hearing on the motion the Court approved the following resolution of the matter:

(1) plaintiffs were to be provided the summary report of deponent Winkelman's investigation; and

(2) regarding Charles Robinson, Charles J. Marcum, Ed Spiker, Tom Okeson, and Jack Acree, plaintiffs were to be provided either

- (a) transcripts of their testimony taken during the course of deponent Winkelman's investigation; or
- (b) their current residential and business addresses, if within reasonable distance of Washington, D.C.

The above materials were to have been produced without deletions purported to be made on grounds of relevance. Furthermore, the option given defendants to provide local addresses in lieu of prior testimony contemplated that provision of this information would be prompt so that depositions could be scheduled.



After the August 14 hearing several weeks elapsed in which, despite phone calls from plaintiffs' counsel to counsel for deponent Winkelman and the District of Columbia defendants, no documents or addresses were produced.

On October 13, 1981, plaintiffs informed the Court of defendants' failure to comply with the Court-approved resolution of this matter and moved the Court for an order enforcing the full scope of plaintiffs' subpoena to Deputy Chief Winkelman.

During the first week of November, 1981, the District of Columbia defendants produced a one-half inch stack of documents from the report of the Winkelman investigation. No transcripts of any testimony were produced. The full text of the report of the investigation was not produced. The pages produced were heavily deleted. No claim of privilege supporting these deletions was filed.

The parties now stand at the eve of trial. The documents from the Winkelman investigation, subpoenaed in August, 1981, are central to plaintiffs' case. Defendants' delay and repeated failure to turn over the documents have prejudiced plaintiffs' trial preparation.

An appropriate sanction for defendants' conduct is an order directing immediate compliance with the full scope of the Winkelman subpoena. Any claim of privilege to withhold portions of the documents must be deemed waived, as no claim of privilege has been asserted, time to litigate the propriety of particular deletions is not available, and plaintiffs' need for the documents outweighs any claim of privilege.

Respectfully submitted,

Anne Pilsbury
Anne Pilsbury
17 Danforth Street
Norway, Maine 02468
(207) 925-1144



Of Counsel:

Arthur Spitzer
Executive Director
American Civil Liberties
Union Fund of the
National Capital Area
Suite 301
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 544-1076

J. E. McNeil
J. E. McNeil

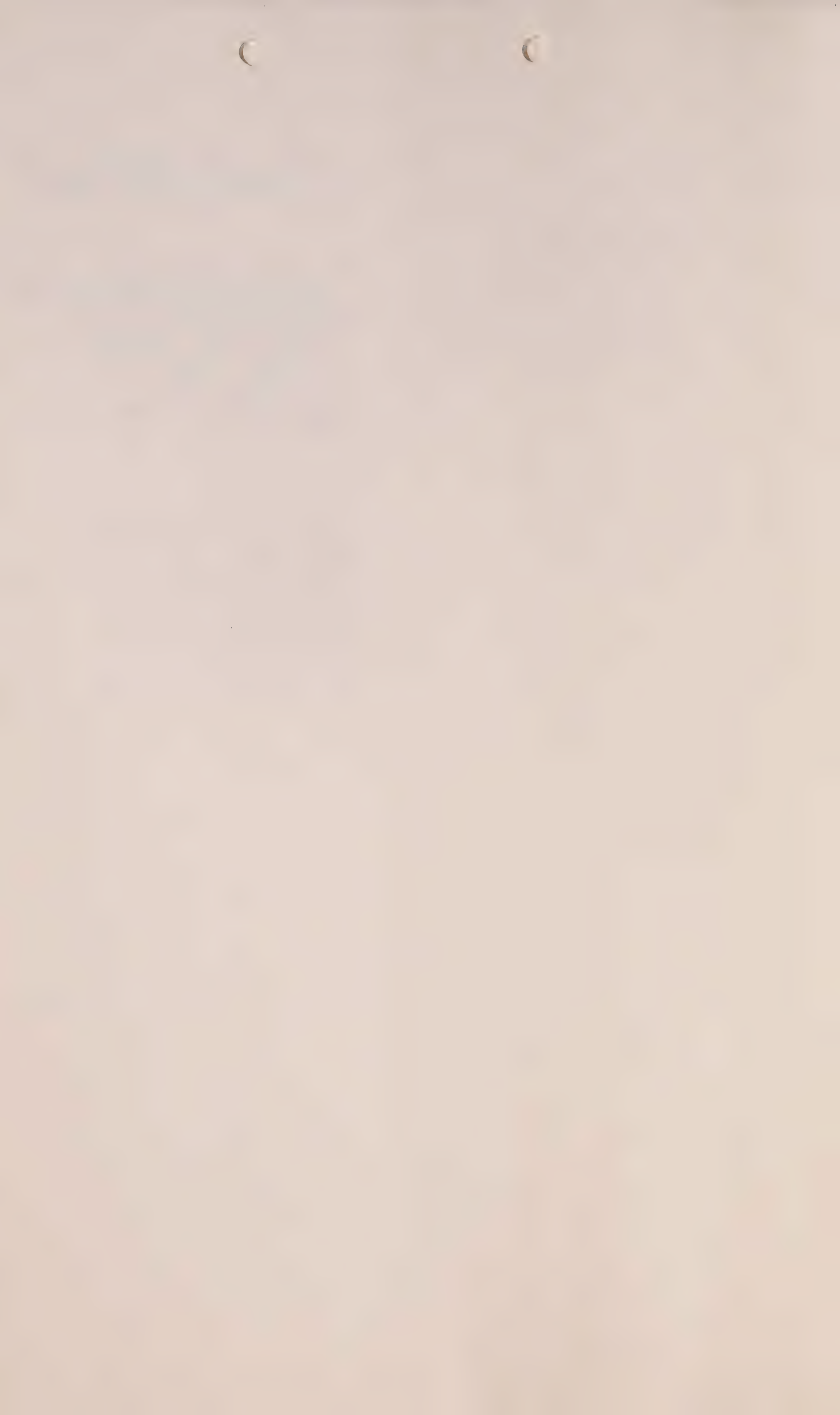
Daniel M. Schember
Daniel M. Schember

Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
Attorneys at Law
1712 N Street, N.W.
Washington, D.C. 20036
(202) 223-9274

Herb Semmel

Herb Semmel
Urban Law Institute
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009
(202) 265-9500

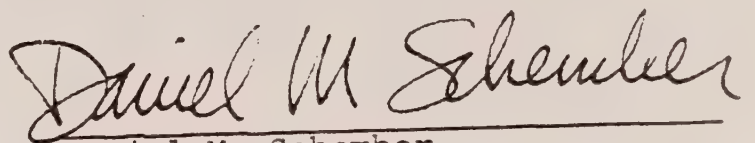
Attorneys for Plaintiffs



United States District Judge

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion To Compel Production Of Documents And For Sanctions, Supporting Memorandum, and accompanying Proposed Order, was personally served this 9th day of November, 1981 on Laura Bond, Assistant Corporation Counsel, 14th & E Streets, N.W., Washington, D.C. 20004, and David H. White, Civil Division, Department of Justice, Washington D.C. 20530.


Daniel M. Schember

Plfs. Response to FBI Δ 5
Motion for Judgment on Pleadings

(Sets forth our theory that
concealment of Cointelpro continued
until Church Comm.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action No. 76-1326
)	
JERRY WILSON, <u>et al.</u> ,)	
)	
Defendants.)	

OPPOSITION TO MOTIONS BY DEFENDANTS
BRENNAN, MOORE, GRIMALDI, PANGBURN, JONES AND WEBSTER
FOR JUDGMENT ON THE PLEADINGS

Plaintiffs respectfully oppose the motions of the above named defendants for judgment on the pleadings.^{1/} Defendants arguments regarding the legal adequacy of plaintiffs claims and the statute of limitations are without merit.

I. THE EVIDENCE IN THIS CASE ESTABLISHES VALID CLAIMS
AGAINST THESE DEFENDANTS.

The evidence establishes a tortious conspiracy by the FBI defendants to interfere with and summarily punish plaintiffs' exercise of first amendment rights. In furtherance of this conspiracy, defendants acted to disrupt or counter plaintiffs' political association and expression by directing undercover informants and infiltrators to sow dissension in political organizations, disrupting logistical arrangements and communications at political demonstrations, covertly preparing and distributing false or derogatory information concerning plaintiffs' first amendment activities and invading plaintiffs' personal and associational privacy by directing undercover informants to collect information on plaintiffs' personal,

^{1/} All of these defendants have joined in a single motion; in addition defendant Pangburn has filed a separate Motion for Judgment on the Pleadings. Both of these motions are opposed.

nonpolitical activities, plaintiffs' political beliefs, and the activities and participants at private political meetings involving plaintiffs, and by directing undercover informants and infiltrators to influence political discussions and organizational decision making at private meetings of groups in which plaintiffs were active.

A. The Evidence Against Defendants Establishes a Tortious Conspiracy to Interfere with and Summarily Punish Plaintiffs' Exercise of First Amendment Rights and Overt Acts in Furtherance of that Conspiracy.

In August 1967 Defendant George C. Moore, Chief of the Racial Intelligence Section of the Federal Bureau of Investigation's (FBI's) Domestic Intelligence Division, inaugurated a conspiracy "to expose, disrupt, misdirect, discredit or otherwise neutralize the activities" of Black political organizations opposed to official government policies. Exhibits A and B. In May, 1968 defendant Charles D. Brennan, Chief of the Internal Security Section of the Domestic Intelligence Division, commenced a similar conspiracy against organizations and individuals labeled "the New Left," primarily white political activists opposed to the war in Vietnam and other government policies. Exhibit C.

The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee) conducted an extensive investigation of these FBI conspiracies, finding them to be

Covert Action programs . . . used to disrupt the lawful political activities of individual Americans and groups and to discredit them, using dangerous and degrading tactics which are abhorrent in free and decent society.

Intelligence Activities and the Rights of Americans, Final Report, Book II, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S.Re.No. 755, 94th Cong., 2d Sess. (1976) (hereafter Book II) at 211.

Exhibit D.^{2/}

The Church Committee also expressly found:

The acts taken interfered with First Amendment rights of citizens. They were explicitly intended to deter citizens from joining groups, "neutralize" those who were already members, and prevent or inhibit the expression of ideas.

Id.

The Church Committee found the motivation for these programs, denominated "counterintelligence programs" (shortened to COINTELPRO) was FBI "frustration with Supreme Court rulings limiting the Government's power to proceed overtly against dissident groups." Id. at 211.^{3/}

The conspiracy against Black groups was labeled "COINTELPRO Black Nationalist - Hate Groups." The targets of this conspiracy included organizations, and their membership, engaged solely in the exercise of first amendment rights and not in any activity

^{2/} The findings of the Church Committee are admissible evidence under Rule 803 (8)(C), Federal Rules of Evidence, the hearsay exception for "factual findings resulting from an investigation made pursuant to authority granted by law." The Church Committee investigation was expressly authorized by S. Res. 21, 94th Cong., 1st Sess. (January 21, 1975). The Committee findings were based upon official FBI documents and testimony under oath by high ranking officials, including defendants Moore and Brennan. The sources of information and circumstances of the investigation render trustworthy any Committee findings adverse to defendants. Freeley v. Rockwell Intern. Corp., 470 F.Supp. 1264, 1266-67 (S.D.Ohio 1979).

^{3/} In support of this finding the Church Committee cited testimony by the former COINTELPRO Unit Chief:

The Bureau personnel involved in COINTELPRO link the first formal counterintelligence program, against the Communist Party, USA, to the Supreme Court reversal of the Smith Act convictions, which "made it impossible to prosecute Communist Party members at the time." (COINTELPRO Unit Chief, 10/16/75, p. 14.) . . . This belief in the deficiencies of the law was a major factor in the four subsequent programs as well: "The other COINTELPRO programs were opened as the threat arose in areas of extremism and subversion and there were not adequate statutes to proceed against the organization or to prevent their activities." (COINTELPRO Unit Chief, 10/16/75, p. 15.)

warranting FBI criminal investigation. The Church Committee found:

The imprecision of the targeting is demonstrated by the inability of the Bureau to define the subjects of the programs. The Black Nationalist program, according to its supervisor, included "a great number of organizations that you might not today characterize as Black Nationalists but which were in fact primarily Black." [Footnote omitted.]

Thus, the nonviolent Southern Christian Leadership Conference was labeled as a Black Nationalist - "Hate Group."

Id. at 213.

The FBI designation "New Left" was equally vague. The Church Committee found:

In conducting a "comprehensive study of the whole New Left movement" (rather than investigating particular violations of law) the FBI defined its intelligence target as a "loosely-bound, free-wheeling, college-oriented movement." Organizations to be investigated were those who fit criteria phrased as the "more extreme and militant anti-Vietnam war and anti-draft organizations.

The use of such imprecise criteria resulted in investigation of such matters as (1) two university instructors who helped support a student newspaper whose editorial policy was described by the FBI as "left-of-center, antiestablishment, and opposed to the University Administration"; (2) a dissident stockholder's group planning to protest a large corporation's war production at the annual stockholder's meeting; and (3) "Free Universities" attached to college campuses, whether or not there were facts indicating any actual or potential violation of law. [Footnotes omitted.]

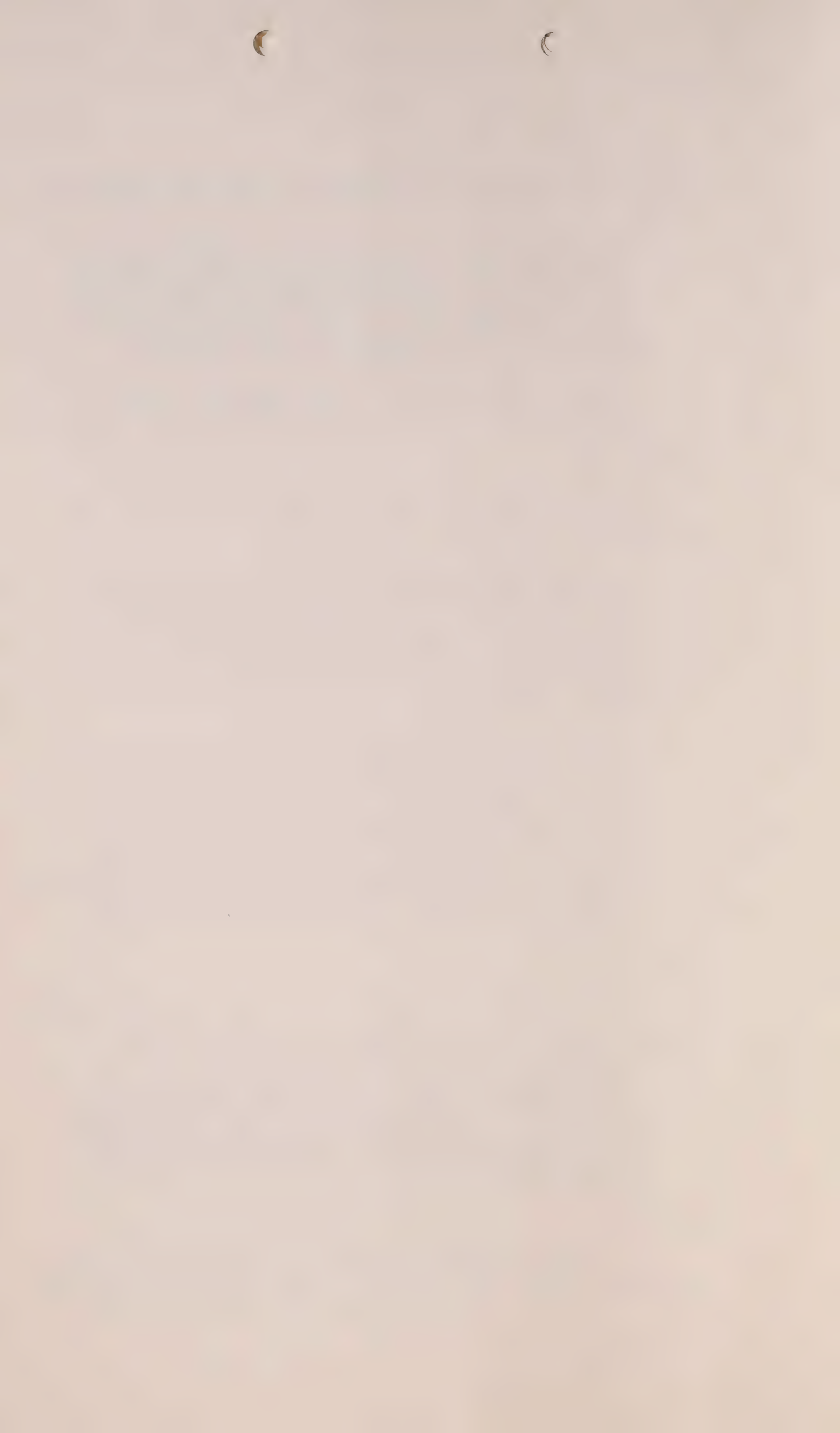
Id. at 173.

The Church Committee also determined the FBI's reasoning in designating such broad targets for COINTELPRO action:

[N]onviolent organizations and individuals were targeted because the Bureau believed they represented a "potential" for violence and nonviolent citizens who were against the war in Vietnam were targeted because they gave "aid and comfort" to violent demonstrators by lending respectability to their cause. [Footnotes omitted.]

Id. at 213.

An essential component of the FBI's covert action conspiracies against first amendment rights was the gathering of



political intelligence. Defendant Moore testified before the Church Committee:

'You can trace [the origins of COINTELPRO] up and back to foreign intelligence, particularly the penetration of the group by the individual informant. Before you can engage in counterintelligence you must have intelligence. . . . If you have good intelligence and know what it's going to do, you can seed distrust, sow misinformation. The same technique is used, misinformation, disruption, is used in the domestic groups, although in the domestic groups you are dealing in '67 and '68 with many, many more across the country . . . than you had ever dealt with as far as your foreign groups.'

Id. at 212, n.7.

The FBI directive initiating the Black Nationalist COINTELPRO also stressed the need for domestic intelligence to carry out COINTELPRO actions:

The activities of all such groups of intelligence interest to this Bureau must be followed on a continuous basis so we will be in a position to promptly take advantage of all opportunities for counterintelligence and to inspire action in instances where circumstances warrant. . . .

. . . .

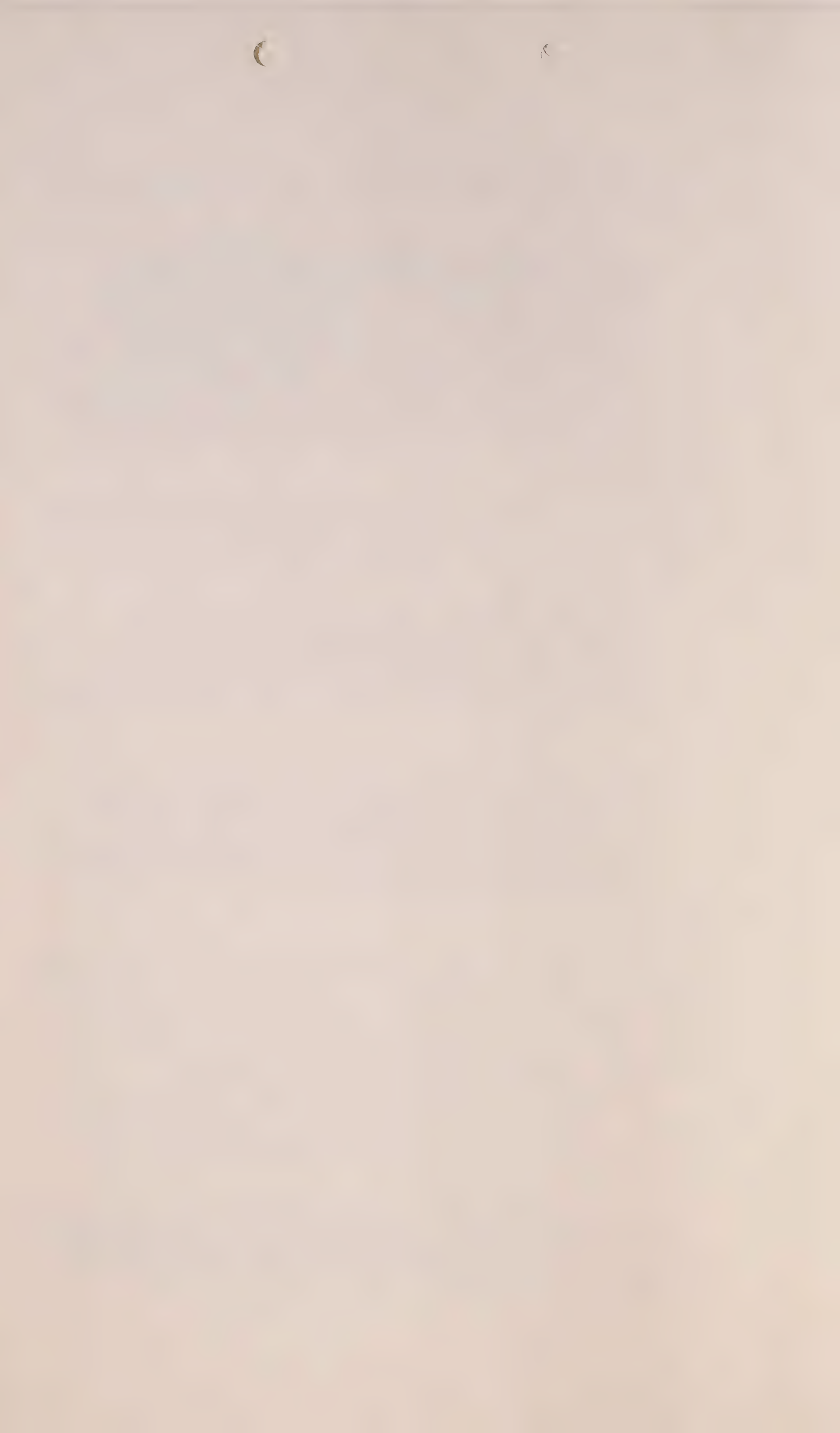
All Special Agent personnel responsible for the investigation of . . . [these] organizations and their memberships should be alerted to our counterintelligence interest and each investigative Agent has a responsibility to call to the attention of the counterintelligence coordinator suggestions and possibilities for implementing the program.

Exhibit A.

The memorandum initiating the New Left COINTELPRO stressed the same point and added "[c]ounterintelligence action directed at these groups is intended to complement and stimulate our accelerated intelligence investigation." Exhibit C.

The COINTELPRO conspiracies were implemented without pretense of legality.^{4/} Rather, the FBI expected not to get

^{4/} Defendant Moore, when asked by the Church Committee "whether anybody in the FBI at any time during the 15-year course of COINTELPRO discussed its constitutionality or legal authority, . . . replied: "No, we never gave it a thought." Id. at 140. See also footnote 3 above.



caught. Both of the memoranda initiating the Black Nationalist and New Left COINTELPROs directed FBI field offices not to reveal the existence of COINTELPRO to anyone outside the Bureau. Exhibits A, B and C. The Church Committee concluded:

In COINTELPRO the Bureau secretly took the law into its own hands, . . . to covertly disrupt, discredit and harass groups and individuals. . . . [I]n COINTELPRO, the Bureau imposed summary punishment, not only on the allegedly violent, but also on the nonviolent advocates of change. Such action is the hallmark of the vigilante and has no place in a democratic society. [Footnotes omitted.]

Id. at 212.

The Washington Field Office (WFO) of the FBI zealously implemented the Black Nationalist and New Left COINTELPROs. Working under Security Coordinator Courtland D. Jones, defendant Gerald T. Grimaldi was responsible for coordinating the WFO's New Left COINTELPRO.

In furtherance of their implementation of both COINTELPROs, WFO agents were instructed to gather information and to be on the lookout for COINTELPRO opportunities. Exhibits A, B, and C. As defendant Jones stated:

A You cannot make a recommendation unless you have some facts. And facts are gathered from Agents on the bricks, and from sources and from newspapers and--and--and a myriad variety of sources--of sources.

C. Jones deposition dated May 5, 1981 at 56.^{5/}

A primary purpose of the WFO's covert actions under COINTELPRO was to sow dissension within political organizations and, especially, divide Black and White groups. Defining the "Potential Counterintelligence Actions" contemplated by the WFO, Mr. Grimaldi wrote FBI headquarters on August 4, 1969:

WFO contemplates the utilization of sources to capitalize on the political differences which are

5/ This was in response to the question:

Q In order to recommend COINTELPRO actions, was it not necessary to gather information concerning what actions might be fruitful?



now prevalent . . . in . . . New Left organizations.

Sources will be encouraged to undertake leadership roles in the various factions and stimulate dissension among them. . . .

Propaganda efforts will also be made to maintain the "separateness" of the blacks and the whites and to stimulate political attacks by the blacks against the "lilly White" New Left groups.

Exhibit E. Ten months later the WFO again stressed this central theme of its COINTELPRO covert actions:

WFO is continuing attempts to develop plans to utilize sources to promote political differences in New Left organizations, and also to turn Black Militant groups away from any alliance with the New Left groups.

Exhibit F.

Plaintiffs were among the principal targets of the WFO's covert acts. In August, 1970 defendants Brennan and Moore directed several field offices, including the WFO, to anonymously mail "to selected individuals and organizations" a "newspaper article describing anti-Semitism of New Left and Black Panther Party (BPP)." Exhibits G and H. Headquarters instructed the field offices:

Insure mailing cannot be traced to Bureau and under no circumstance is Bureau to be acknowledged as source of enclosure. Maintain list of addressees for possible follow-up counterintelligence materials.

Exhibit H. To carry out this directive the WFO selected addressees "on the criteria of their involvement in the New Left movement, Black Power movement, or their prestige in the Jewish Community." Exhibit I. Plaintiffs Abbott, Bloom, and Waskow were among 25 persons selected to receive the mailing from the WFO. Id.

Other primary targets of WFO covert action were organizations in which plaintiffs were active participants or leading members, including Martin Luther King's Poor People's Campaign, the New Mobilization Committee to End the War in Vietnam (NMC) and its local affiliate, the Washington Mobilization Committee

(WMC), the Student Mobilization Committee (SMC), an arm of NMC, and the Black United Front (BUF).^{6/}

In March, 1968 defendant Moore, as part of the Black Nationalist COINTELPRO, directed the preparation and dissemination to "cooperative national news media" information "designed to curtail success of Martin Luther King's fund raising for the Washington Spring Project," the Poor Peoples' March on Washington, for which plaintiff Eaton was a local organizer. The FBI-drafted news release argued "King doesn't need" the contributions he was seeking and "will only use the money for other purposes." Exhibit J. In May, 1968 defendant Moore directed preparation and dissemination of another release, this one implying the "potential for trouble" and "explosive situation" posed by participants in the Poor Peoples' Campaign. Exhibit K. In June, 1968 defendant Moore again directed preparation of a release ridiculing the Poor Peoples' Campaign for using funds to purchase vehicles instead of food. Exhibit L.

In January, 1969 the FBI launched other covert actions against plaintiffs' exercise of first amendment rights. Plaintiffs were principal organizers of demonstrations coinciding with the inauguration of President Nixon. To disrupt arrangements for these demonstrations, defendant Grimaldi obtained Washington Mobilization Committee forms for arranging demonstrator housing, Exhibit M, and permission from FBI headquarters to "fill them in with fictitious names and addresses, and return them to WMC." Exhibit N. Defendant Grimaldi's memorandum to FBI Headquarters noted that as a result of a similar covert

^{6/} The Reverend David Eaton was a local organizer for King's Poor Peoples' Campaign. Waskow and Bloom were national steering committee members of NMC. Waskow and Bloom were leaders and officers of WMC. Waskow and Pollock worked with SMC. Eaton, Abbott, and Booker participated in BUF. Tina Hobson, Washington Peace Center and Washington Area Women Strike for Peace were participates in many of the activities and efforts of BUF, NMC, SMC, and WMC.



action in Chicago "numerous demonstrators made useless trips to locate nonexistent addresses, some of whom became incensed with RENNIE DAVIS, Project Coordinator of NMC." Exhibit M. The FBI Headquarters memorandum granting approval for this operation also bears the initials of defendant Courtland Jones, defendant Grimaldi's supervisor. Exhibit N.

Defendant Grimaldi later reported, that, to disrupt the demonstration itself, the WFO

engaged in a "disinformation" program . . . utilizing the "citizen" band. This was done by identifying with the NMC network as a unit within that network and by countermanding NMC orders to the marshals and by supplying the marshals with misinformation.

Exhibit O. Concerning this same incident WFO Special Agent Wilfred Schlarman wrote his supervisor:

WFO continued to harass the various NMC units asking for position and status reports and relaying erroneous information back to NMC headquarters. During the conclusion of the parade . . . it became apparent that the NMC was trying to establish a rendezvous point . . . and WFO relayed instructions to various units to report to different park areas. . . .

WFO feels that it was instrumental through this counterintelligence technique in preventing the various NMC units from effectively coordinating counter-Inaugural activity.

Exhibit P. Defendant Grimaldi concluded:

A source of WFO who was a marshal and part of the NMC communication network advised WFO that the NMC communications broke down and did not operate the way they had it planned. The source stated that very confusing orders were issued and then countermanded, that NMC groups were dispatched to areas that had no relevance to the Inauguration activities.

The Bureau may wish to suggest to other field offices this technique in the event other offices encounter demonstrations in which the demonstrators use radios operated on the "citizen" band for communication.

Exhibit O.

In the late Summer and early Fall of 1969 the WFO commenced a series of covert actions designed to instigate opposition within the Black United Front (BUF) to the plans of the New Mobilization Committee (NMC) to hold a major anti-Vietnam war



rally in Washington, D.C. on November 16, 1969. Special Agents Robert Wall and Harry G. Ervin directed informants in the BUF to propose that the BUF demand from the NMC one dollar per demonstrator and threaten to disrupt the demonstration if the money were not paid. Exhibit HH. These agents drafted a BUF demand letter, Exhibit Q, and their informants succeeded in pressing the demand. The BUF demand letter was sent to key NMC leaders, including plaintiff Bloom. Id.^{7/}

In a memorandum dated August 21, 1969, FBI Headquarters noted that the differences between the NMC and the BUF created an "ideal situation to exploit through the Counterintelligence Program," and instructed seven field offices in addition to the WFO to submit recommendations for covert action:

Consideration is to be given to utilizing informants in both racial and nonracial protest groups in this matter. It is noted that the nonracial protest groups, particularly the NMC, can be accused of racism in refusing to go along with this demand. At the same time, such groups could be split further by some individuals calling the Front's demands extortion while other individuals in the group support the demands.

Exhibit S.

Responding to this Headquarters memorandum the WFO suggested informing the National Welfare Rights Organization (NWRO) of the BUF demand "to start NWRO people to thinking, 'Why should we poor assist the NMC for nothing when the "fat cats" at BUF are getting paid for the promise of their support?'"

Exhibit T. The WFO reasoned:

Logically, the NWRO should come to the conclusion that it should make similar demands on the NMC on condition that if its demands are not met, it will withdraw its support. Even if the NWRO does not reach this conclusion, it is certain that many of its members will be resentful of BUF and the NMC. On the other hand, BUF should resent the NWRO demanding its share of the "loot". This could also alienate other Black groups who may be planning to support the NMC.

^{7/} The NMC designated plaintiff Waskow to coordinate negotiations with the BUF regarding the demand. Exhibit R.

The NMC will be placed in the untenable position of either meeting the demands, which would obviously weaken the organization financially and otherwise, or if it refuses, lose the Black support which it seeks. It is conceivable that the resulting situation might force the NMC to cancel its mass rally on Washington, D.C., 11/15/69.

Id. The WFO recommended using informants to carry out this plan:

WFO would utilize sources and other means to agitate within the BUF, insisting its demands are reasonable and due the Black community; therefore, the NMC must meet them. Within NWRO, it would be argued that "we" poor people need help much more so than does BUF; that the NMC must help us, too, if it wants our support.

Field offices having NMC representation would utilize their sources in splitting the NMC. Some sources would be directed to argue that to meet the demands is "pure extortion". Others should take the position that is is the duty of white liberals everywhere to support the needs of the Black community. . . .

This division of opinion should create serious schisms within the NMC Steering Committee and between the organizations which it represents.

Id.

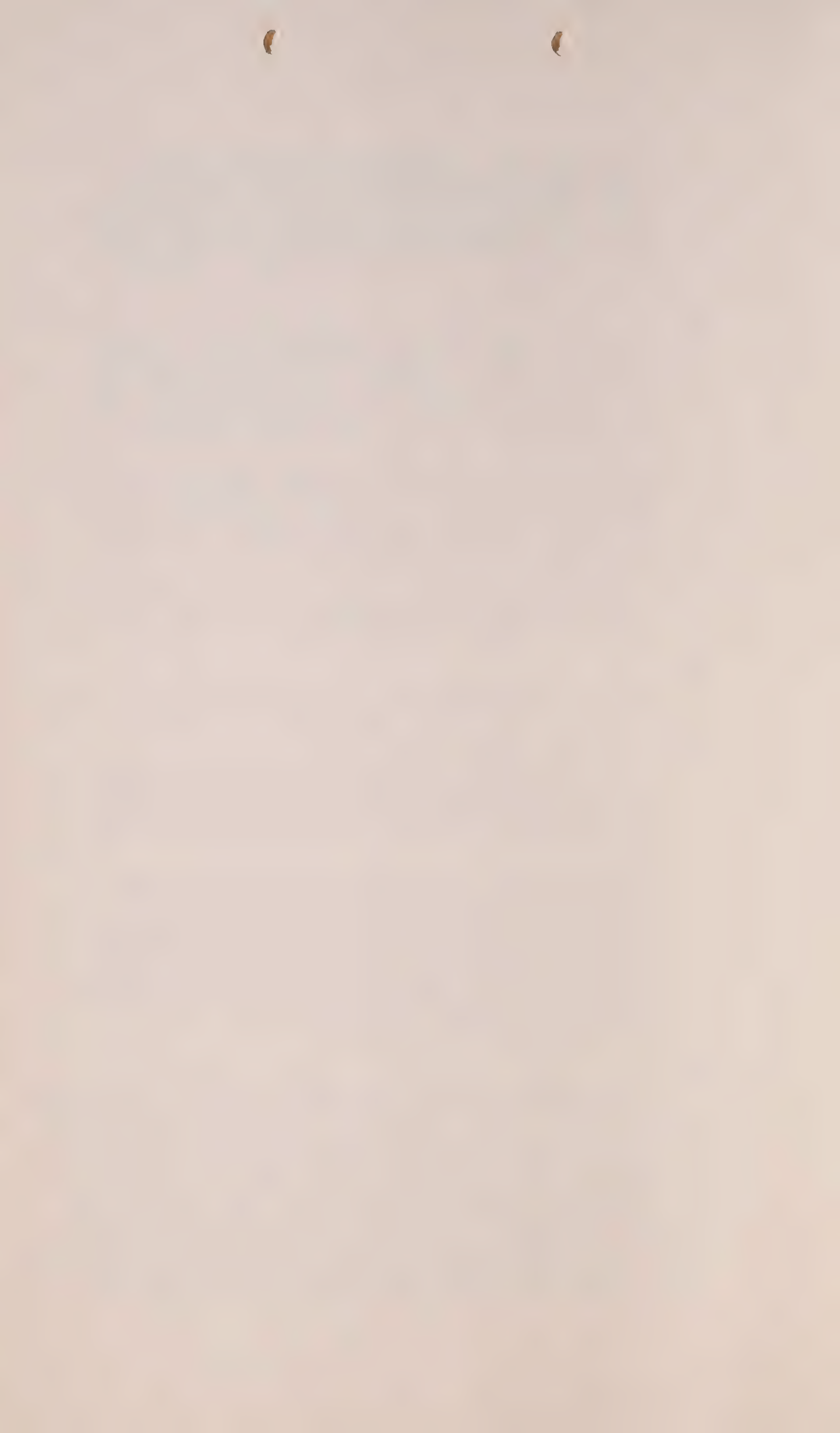
The WFO also recommended a second plan predicated on the NMC's partially meeting the BUF demand:

WFO contemplates the enlistment by the Bureau of a friendly syndicated columnist who would be fed sufficient material and leads with which he could write a special feature "expose" of the "blackmail" of the NMC. . . .

Assuming that the "expose" is written and picked up on one of the wire services, it would serve the purpose of alerting Black militant groups in other cities to the possibility of milking white liberals in their community. . . . The resulting bickering, resentment and distrust could be fomented by sources with the hope that the New Left and the Blacks become so ineffective they will be devoting all their time and energy defending themselves.

Id.

In September, 1969 the WFO learned through informants that Julius Hobson, a member of the BUF, opposed the BUF demand and had agreed to speak at the NMC rally planned for November 15. In a memorandum bearing defendant Jones' approving initials, the WFO recommended to Headquarters "a counterintelligence project calculated to tarnish the image of Julius Hobson and create



internal dissension within the ranks of the BUF":

WFO is of the opinion that a carefully prepared and properly worded news release passed on to reporters or columnists known to be friendly to the Bureau could result in acute embarrassment to Hobson and cause internal dissention [sic] within the ranks of the BUF.

[T]he article could be worded as coming from a leader of . . . the BUF . . . who accuses Hobson of revealing his true colors as an "Uncle Tom" who has sold out the interest of the black community to white intellectuals and white radicals. . . .

The article should be so written that the "BUF Official" expresses his dismay that Hobson would place his political future and personal gain before his black brothers, and allude that Hobson may not be the best possible candidate for the D.C. School Board.

Exhibit U. Subsequently, the WFO prepared the bogus news release and submitted it to FBI Headquarters for dissemination.

Exhibit V. A memorandum from the WFO to Headquarters dated October 10, 1969 indicates that dissemination of the bogus release was "handled" at FBI Headquarters. Exhibit W.

Five days later, defendant Brennan directed the anonymous mailing of a racist leaflet, written in the form of a letter to the BUF from the NMC, and rejecting the BUF money demand. The FBI memo stated:

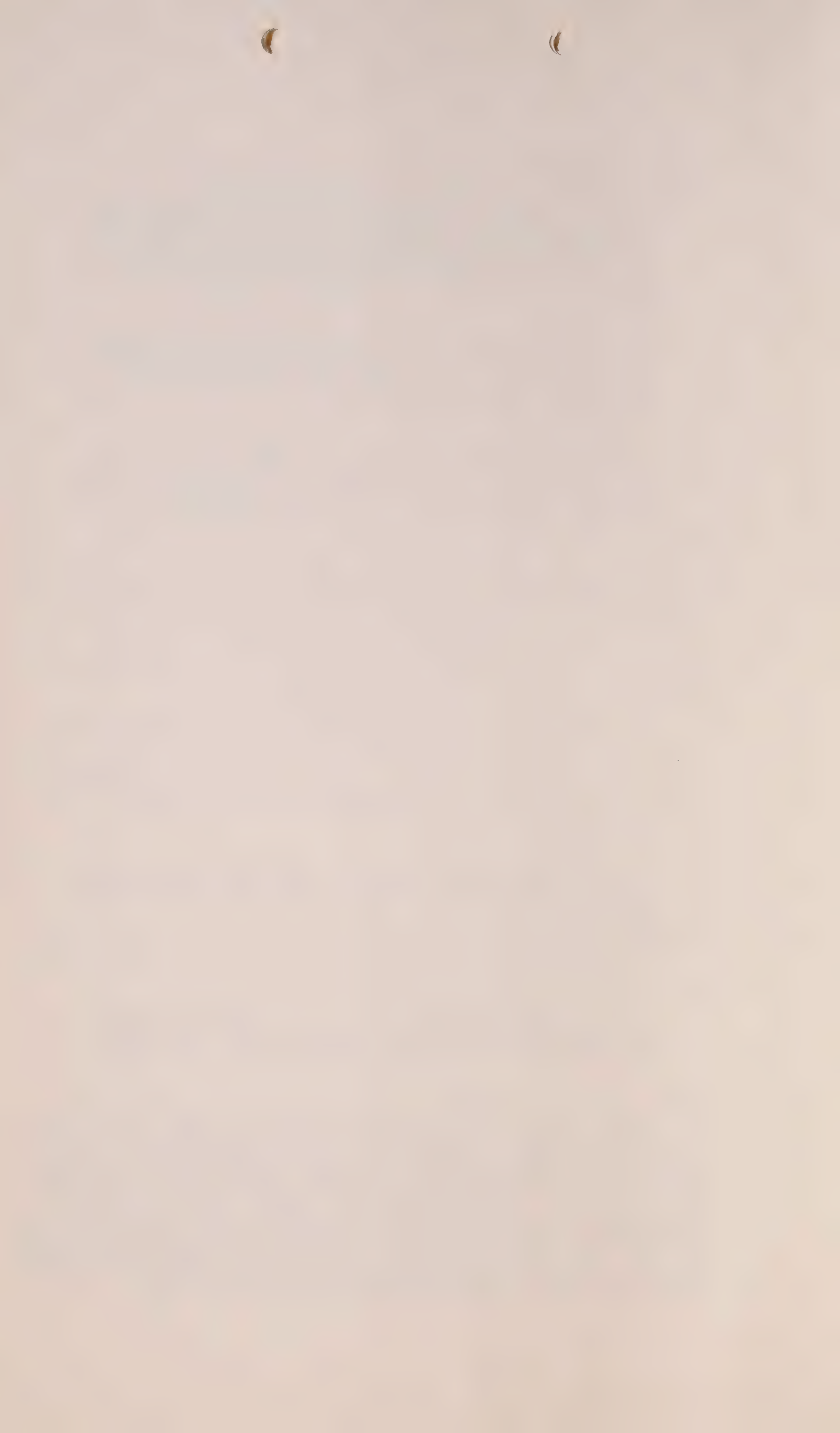
We have been trying to create a split between these groups based upon this demand. This leaflet may serve such a purpose.

Exhibit Y.^{8/}

The leaflet, bearing the picture of a monkey and referring to Douglas Moore as "the Zulu King," stated:

The march for peace will go on as scheduled in spite of any blackbirds who try to shit on it. Mr. Moore and his pack or herd or pride or whatever you call a

^{8/} In September, 1969 defendant Brennan, in order "to further split the black militants from the New Left," had initiated preparation and distribution "of a blind memorandum revealing evidence of the growing dissatisfaction of militant blacks with the New Left." Referring to the BUF money demand, the Brennan memorandum initiating this proposal argued "that should this information be publicized it will create dissension within both the New Left and black militant groups." The memorandum notes that dissemination of the blind memorandum was subsequently "handled" through the FBI's "Mass Media Program." Exhibit AA.



group of bloodsucking animals, are in for a shock. We say: if they must get something in return for their non-violence toward NMC during these days of demonstrations, give them BANANAS - all they can eat. . . .

If you won't join us you're against us. It's as simple as that. We consider you and your kind as black bandits and the most dangerous of the elements eating away at the movement.

. . .

Suck on your bananas, brother and someday you might learn how to make fire or build a wheel.

Exhibit X. 50 copies of this leaflet were anonymously distributed by the Washington Field Office "to logical leaders in the BUF, NMC and Vietnam Moritorium Committee in the Washington area.

Exhibit Z.

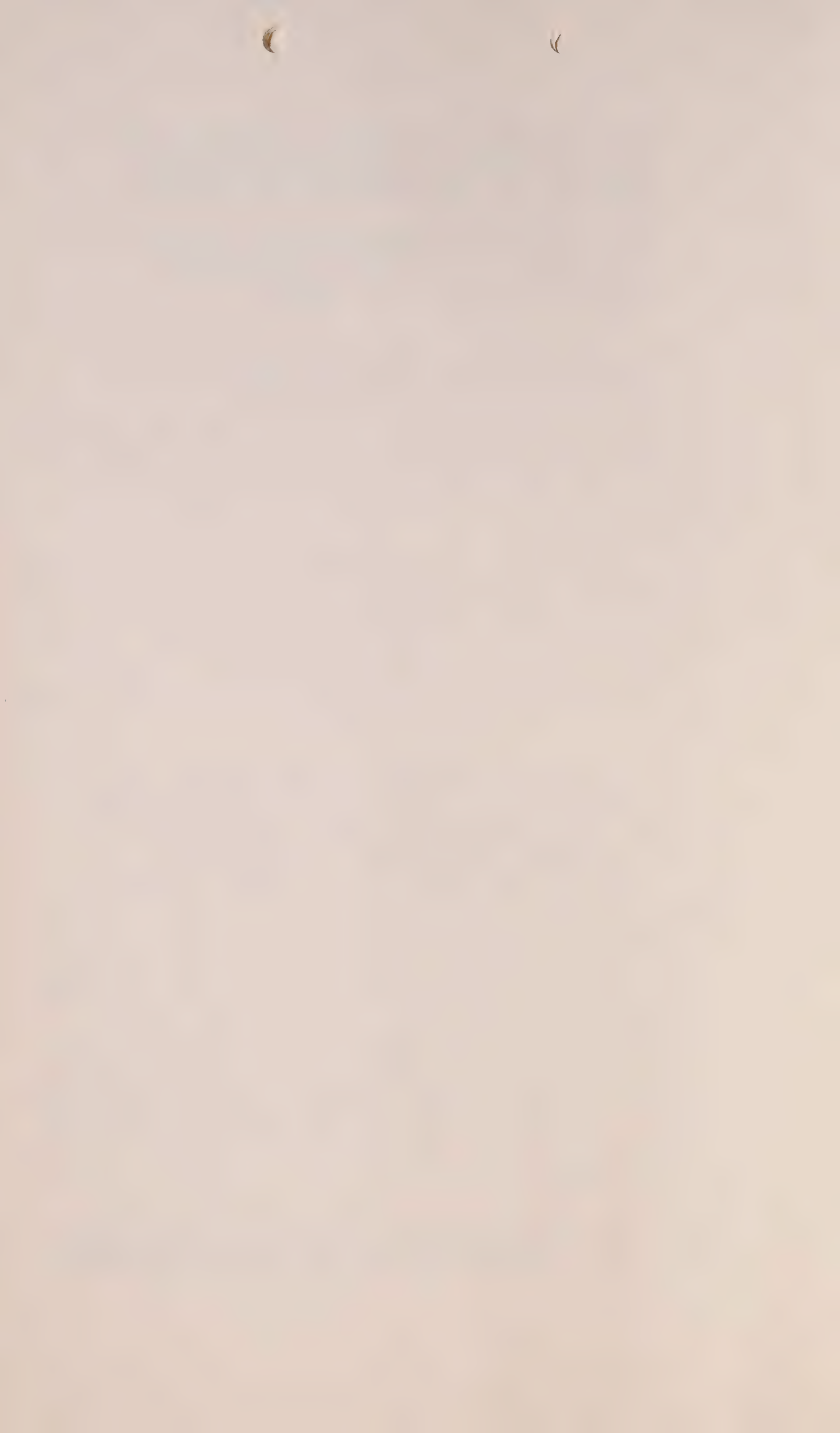
Also in October, 1969, defendant Grimaldi, with the approval of defendants Jones and Brennan, wrote, printed, and distributed on the campus of American University a bogus newspaper urging students not to support the anti-war mobilization committees and threatening adverse future consequences of anti-war activism:

VIETNAM WAR

Many people from the entire political spectrum are against the war in Vietnam. Don't hesitate to question the motives of the SDS, the SMC-YSA and MOBE. Use your God-given intelligence. Remember, you will be faced with joining society upon completion of your academic training. Don't do anything in haste today which could cause you embarrassment tomorrow.

Exhibit BB. The newspaper purported to be the product of "a small group of students" who "cannot identify ourselves for we take classes with some who do not believe in freedom and grade accordingly." The bogus paper stated that "Socialism . . . suffocates Freedom," then urged students to seek an injunction against the official student newspaper^{9/} because the latter was "political in nature." Id. Defendant Grimaldi later reported to FBI headquarters:

9/ Plaintiff Pollock, a student at American University at the time, was a staff member of the student newspaper, The Eagle.



WFO through sources has distributed "The Rational Observer," a WFO publication, on the American University campus.

As a result of this publication, sources advised that students on that campus became aware of the nature of SMC and its affiliation with the YSA and partially as a result of this, refused to participate in an SMC planned demonstration on that campus.^{10/} Exhibit EE.

Under the direction of defendant Brennan and other high ranking officials, the FBI continued in 1970 to sow dissension within anti-war groups in which plaintiffs were active, leading members. A principal FBI target was the New Mobilization Committee to End The War in Vietnam (NMC). Plaintiffs Bloom and Waskow were members of the National Steering Committee of that organization.

The theme of the "Rational Observer" showing the "nature of SMC and its affiliation with the YSA" was carried out on a larger scale with NMC. The FBI's plot centered on dividing steering committee members who were also members of the Socialist Workers Party (SWP) from those on the steering committee not associated with SWP.

In February, 1970, the FBI anonymously prepared and distributed to the NMC Steering Committee and "selected officials of the Vietnam Moratorium Committee in Washington, D.C." a memorandum purported to be from a former member of the Steering Committee and current active member of the Vietnam Moratorium Committee. The memorandum, arguing "the Trotskyites have literally taken control of the body proper and have repeatedly resisted efforts to recruit black brothers into NMC leadership," was designed by the FBI

to cause splits within NMC leadership by pitting the non-Trotskyites against radicals who are members of the Socialist Workers Party (SWP).

Exhibit FF.

The memorandum also accused the NMC of breaking promises to the Black United Front (BUF):

^{10/} Plaintiff Pollock was active with the SMC at American University.



The attitude of the Steering Committee towards the BUF was and is a matter of disgrace. In the main, NMC leadership has been no better than the racist politicians and phony liberals who give lip service to the Black community and turn their backs on any positive action.

Id.

Ten days later, the FBI anonymously prepared and mailed an illustrated leaflet depicting rape of the NMC by the SWP and arguing "the crap influence of the Socialist Workers Party and its bastard youth group - Young Socialist Alliance - must be flushed from New Mobe once and for all. . . . DEMAND AN END TO SWP BALLING! Write New Mobe today at Suite 900, 1029 Vermont Avenue, N.W., Washington, D.C." Exhibit GG. The FBI memorandum describing this leaflet stated:

The leaflet is designed to cause disruption in the peace movement, primarily in the New Mobilization Committee to End the War in Vietnam, and to minimize the growing influence of the SWP in the movement. It is also designed to cause consternation and confusion in the SWP itself.

The enclosed has been marked "Obscene" because of its contents.

Id.

Defendants are liable to plaintiffs under 42 USC §1985(3) and directly under the First Amendment, both for the conspiracy to violate plaintiff's First Amendment rights and the overt acts committed in furtherance of that conspiracy. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1974); Griffin v. Breckenridge, 403 U.S. 88 (1971); Dellums v. Powell, 184 U.S. App. D.C. 275, 566 F.2d 167 (1977); Paton v. La Parde, 524 F.2d 862 (3d Cir. 1975); Founding Church of Scientology v. Director, Federal Bureau of Investigation, 459 F.Supp. 748 (D.D.C. 1978); C. J. Antieu, Federal Civil Rights Acts: Civil Practice §§361, 365 (1980).

B. The Evidence Establishes Defendants' Liability for Unwarranted Surveillance of Plaintiffs' Private and Other First Amendment Activities

In addition to their liability for conspiring to disrupt and counteract plaintiffs' First Amendment activities and for



committing disruptive, overt acts in furtherance of that conspiracy defendants are also liable to plaintiffs for pervasive privacy invading surveillance infringing plaintiffs' First Amendment rights.

All plaintiffs were targets of FBI domestic intelligence investigations.^{11/} They were selected to be targets because of their political beliefs and activities, not because of any activity constituting federal criminal violations falling within the jurisdiction of the FBI.^{12/} These pervasive investigations (a) used undercover informants to infiltrate plaintiffs' private political meetings and to gather information on plaintiffs' political beliefs and private personal and political activities; (b) used undercover informants to infiltrate organizations in which plaintiffs were active in order to identify the membership of the organization and, through obtaining positions of leadership in the organizations, discover and influence the organization's First Amendment activities; and (c) used warrantless electronic surveillance of political organizations to intercept and record plaintiffs' private telephone conversations.

Relying on Laird v. Tatum, 408 U.S. 1 (1972), defendants argue that these domestic intelligence investigations violated no Constitutional guarantees. In Laird v. Tatum, however,

^{11/} See Exhibits II, JJ, KK, LL, MM, NN, OO, PP, and QQ, for samples of each plaintiff's domestic intelligence files.

^{12/} Agents Waite, Aldhizer, Gallota, Keller, and Krebs were specifically asked if the investigations of defendants Waskow, Booker, Eaton, Bloom and Abbott were criminal investigations or concerning violation of any specific federal law. The answers were "no". Hilmer Krebs deposition dated March 11, 1981 at 8; John T. Aldhizer deposition dated June 22, 1981 at 62; Joseph Keller deposition dated March 16, 1981 at 30; Edwin Waite deposition dated March 10, 1981 at 16; Peter A. Gullota, Jr. deposition dated March 18, 1981 at 11, 12. Defendant Grimaldi stated generally:

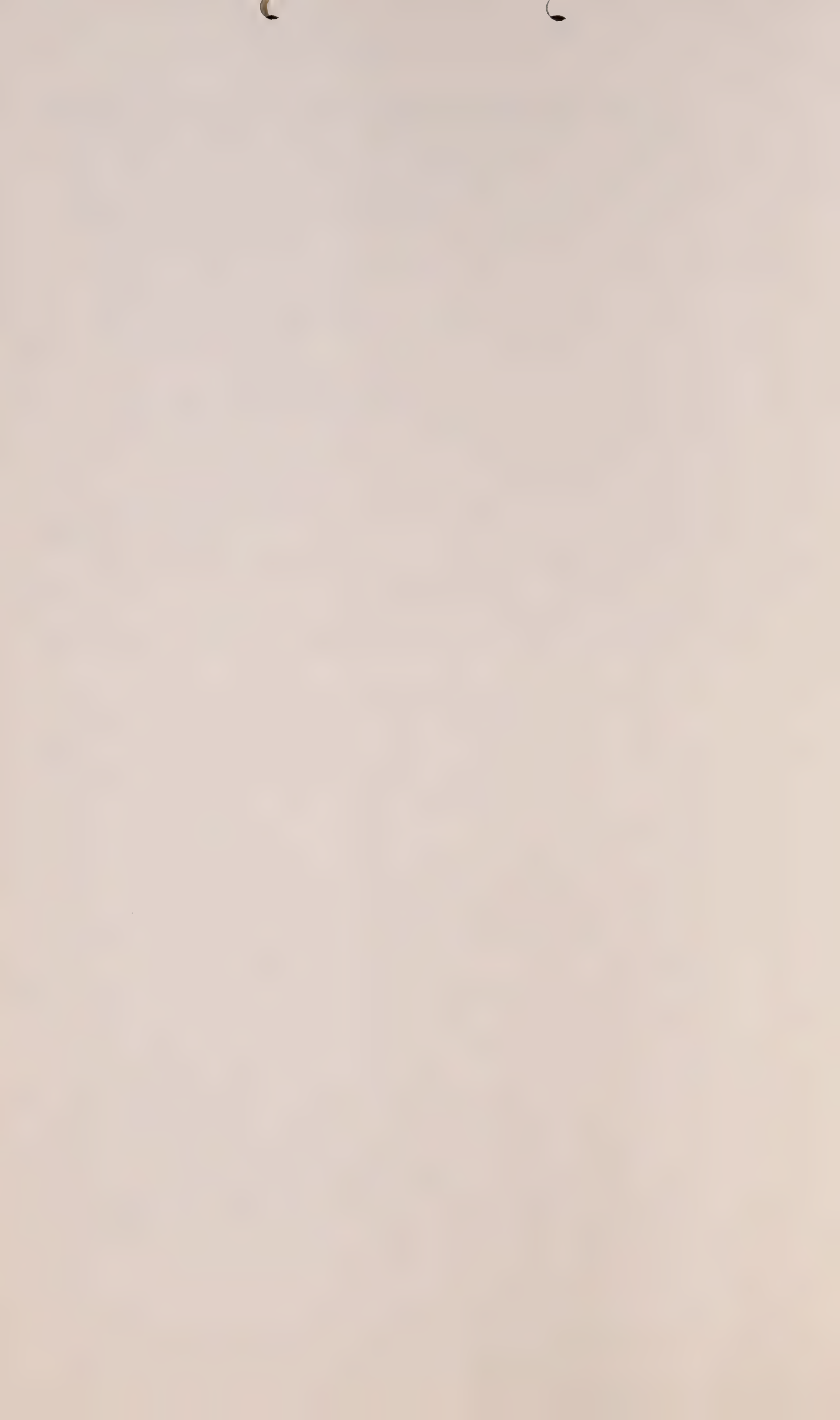
Q. Was advocacy of overthrow of the government alone a sufficient criterion for the commencement of an investigation?

A. Well, yeah, basically advocacy in addition to some sort of overt act. If they would get out in, say, public, and give a speech to say we have to overthrow the United States government.

Gerald T. Grimaldi deposition dated March 5, 1981 at 8.

plaintiffs had challenged merely the existence of a government information gathering system which was limited to information either gathered from public sources or of a kind which would ordinarily be available to newspaper reporters. Courts have repeatedly held that where surveillance activities invade privacy, are far in excess of those activities reasonably necessary for any legitimate governmental purpose, and are combined with acts to disrupt First Amendment activities, a cause of action will lie. Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate, 519 F.2d 1335 (3d Cir. 1975); Jabara v. Kelley, 476 F.Supp. 561 (E.D. Mich. 1979); Founding Church of Scientology v. Director, Federal Bureau of Investigation, 459 F.Supp. 748 (D.D.C. 1978); Socialist Workers Party v. Attorney General, 463 F.Supp. 515 (S.D.N.Y. 1978); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976); Handschu v. Special Services Division, 349 F.Supp. 766 (S.D.N.Y. 1972).

Government gathering of private political information invades associational privacy and can be justified only if the government interest served thereby is substantial and unrelated to suppression of free expression and if the government intrusion is no greater than that essential to furtherance of the legitimate government interest. United States v. O'Brien, 391 U.S. 367, 377 (1968); NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Jones v. Unknown Agents of the FEC, 613 F.2d 864 (D.C. Cir. 1979). Even where the extraordinary powers of the executive office have been invoked properly in the name of national security, the restrictions of the Constitution must still be balanced with the government's interests. United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972) (hereinafter referred to as Keith); Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979), aff'd, ___ U.S. ___, 69 L.Ed.2d 367, 101



S.Ct. ____ (1981). Zweibon v. Mitchell, 516 F.2d 594 (D.C.Cir. 1975), cert. denied, 425 U.S. 944 (1976). Defendants' invasion of plaintiffs' personal and associational privacy is actionable under these standards since the government has no legitimate interest in compiling dossiers on political beliefs and activities, the government's purpose in compiling this information was directly related to suppression of free expression through covert counter-intelligence action, and the intrusive investigative techniques were used to an extent far in excess of that reasonably necessary for even any hypothetical governmental interest that might be legitimate and served by the investigation.^{13/} At a minimum the evidence discussed above establishes that suppression of free expression was a substantial motivating factor guiding the conduct of the domestic intelligence investigations; therefore the burden of proof is now on defendants to demonstrate that their surveillance was legitimate and would have been properly conducted to the same degree it was in the absence of this illicit motive. Mount Healthy City Board of Ed. v. Boyle, 429 U.S. 274, 287 (1977). Defendants therefore are not entitled to judgment on the pleadings.

^{13/} Examples of the sheer overbreadth of the files kept on plaintiffs by WFO:

In Sammie Abbot's file information concerning his and his wife's joint checking account is noted including the fact that he (or his wife) paid Cornell University \$116.88 with a check dated March 31, 1966 for the April tuition of his daughter. (It is further noted that this information may not be "made public except upon the issuance of a subpoena duces tecum to [deletion] Suburban Trust Company.) Exhibit II, page 434.

In Rooker's file is information concerning his fiancée's lack of a police record and his step-father's numerous traffic violations since 1958. Exhibit KK, pages 202 and 239.

In Bloom's file information concerning his child participating "in the affairs and activities" of the Cooperative Jewish Children's School of Greater Washington. Exhibit JJ, page 33.

In Tina Hobson's file information concerning speculation as to why she and her first husband got divorced in the early '60s. Exhibit MM.

In Pollock's file information as to why he felt that he could not vote for McGovern. Exhibit NN, page 25.

In Waskow's file information concerning his "anti-Zionist" beliefs. Exhibit QQ pages 1783 through 1797.



II. PLAINTIFFS' CLAIMS ARE NOT BARRED BY ANY STATUTE OF LIMITATIONS.

A. No Statute of Limitations Applies to This Case.

The acts of the federal defendants in this case are cognizable directly under the Constitution. Bivens, supra. No statute of limitations applies to such a cause of action. In such cases only laches, not present here, limits the time in which a claim may be presented.

Defendants' argument that District of Columbia law applies to this case is without merit.^{14/}

Bivens defendants are federal officials brought into federal court for violating the Federal Constitution. No state interests are implicated by applying purely federal law to them. While it makes some sense to allow aspects of §1983 litigation to vary according to laws of the States under whose authority §1983 defendants work, federal officials have no similar claim to be bound only by the law of the State in which they happen to work.
[Citations omitted.]

Carlson v. Green, 446 U.S. 14 at 24, n. 11 (1980)

It is true that in actions at law premised on federal statutes the Supreme Court has held that congressional silence regarding limitation of actions should be interpreted to mean that Congress intended the local limitations to apply. Holmberg v. Armbrrecht, 327 U.S. 392 (1946). But, where federal courts are asked to enforce an equitable right created by Congress, local statutes of limitations are not controlling measures; rather they have been "drawn upon by equity solely for the light they may shed..." Id. at 396.^{15/}

In an action brought directly under the Constitution, the federal courts exercise their Article III power in its most fundamental form.

14/ Federal defendants rely on Shifrin v. Wilson, 412 F.Supp. 1282 (D.D.C. 1976) which held that in an action brought under the Constitution against a D.C. official local limitations apply.

15/ Even if an action for damages is barred, nothing precludes continuation of the action for declaratory relief.



"[I]t is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." Carlson, supra, at 23. If the relevant state survival statute,^{16/} a statute of limitation of sorts, would abate a "Bivens-type" action brought against a federal official whose conduct results in the plaintiff's death, the federal common law allows survival of the claim in order "not to 'frustrate in an important way the achievement of the goals of Bivens actions" Carlson, supra, at 25.^{17/} The failure of Congress to establish a statute of limitations for such cases carries no implication. Laches, not the D.C. statute of limitations, should apply.

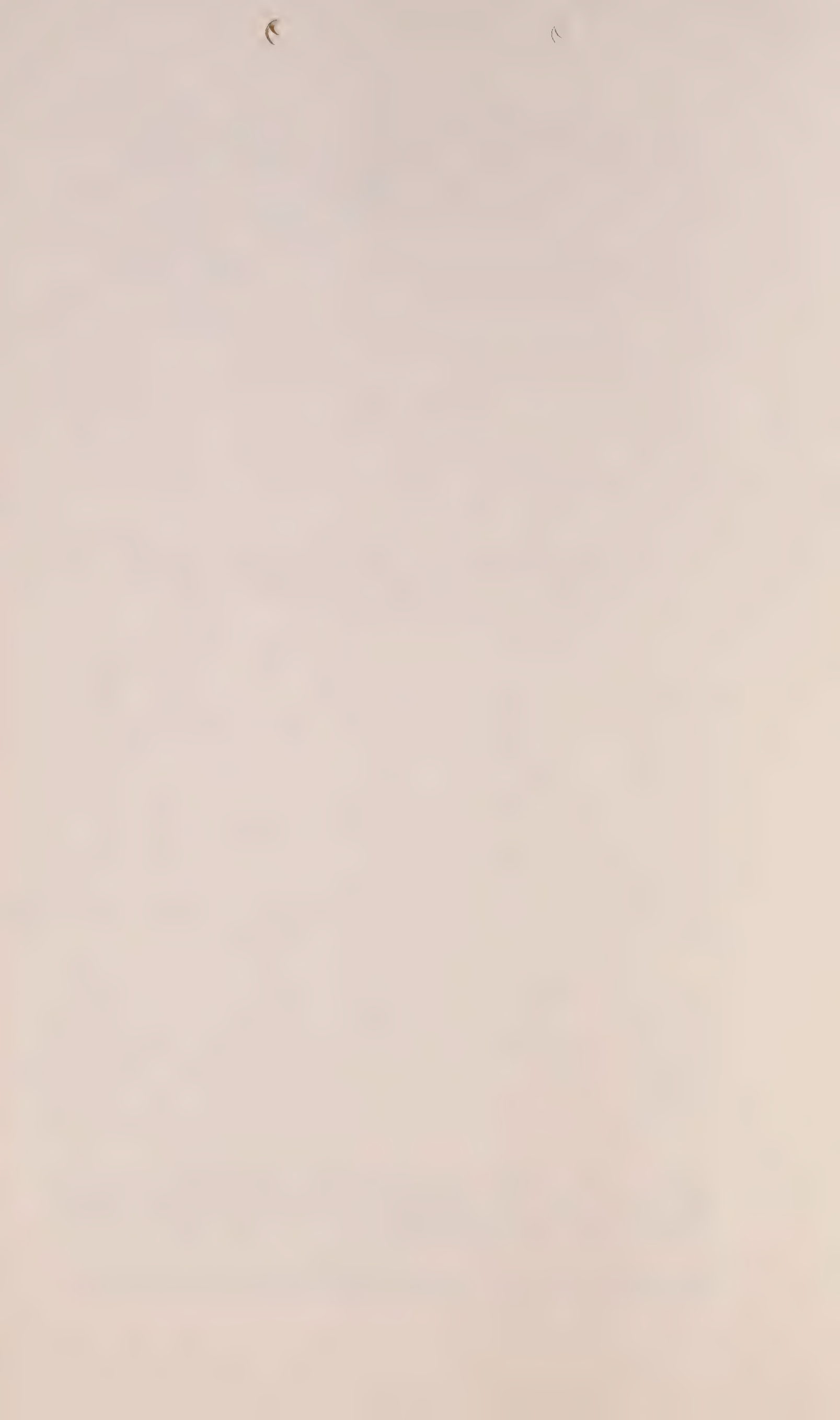
- B. Even if the D.C. Statute of Limitations Applies, it Was Tolloed by Defendants' Concealment of Their Wrongs Until the Church Committee Published Its Findings in April 1976; Plaintiffs' Action, Therefore, Was Timely Filed.

The covert secretive nature of defendants' domestic intelligence investigations and attacks on plaintiffs' free political association and expression made it impossible for plaintiffs to realize they had a cause of action at the time these acts occurred. Plaintiffs had no adequate basis to file suit until the FBI's misconduct was revealed by the Church Committee Reports published in April 1976. At least one court has expressly so held in similar litigation. Davidov v. Honeywell, Inc., 4-77 Civ. 152 (June 12, 1981). Exhibit RR.

It is well-established that a defendant's concealment of the material facts, and a plaintiff's consequent inability to discover them, tolls the statute of limitations. Fitzgerald v. Seamans, 180 U.S.App.D.C. 75, 553 F.2d 220 (D.C.Cir. 1977); Smith v. Nixon, 196 U.S.App.D.C. 276, 606 F.2d 1183 (D.C.Cir. 1979).

^{16/} Not to be confused with a wrongful death which is an action for the harm a death causes the survivors, a survival statute provides under what circumstances a claim for injury to the deceased survives his or her death.

^{17/} Carlson was an action by an estate for the injury and death caused to a prisoner by alleged 8th amendment violations.



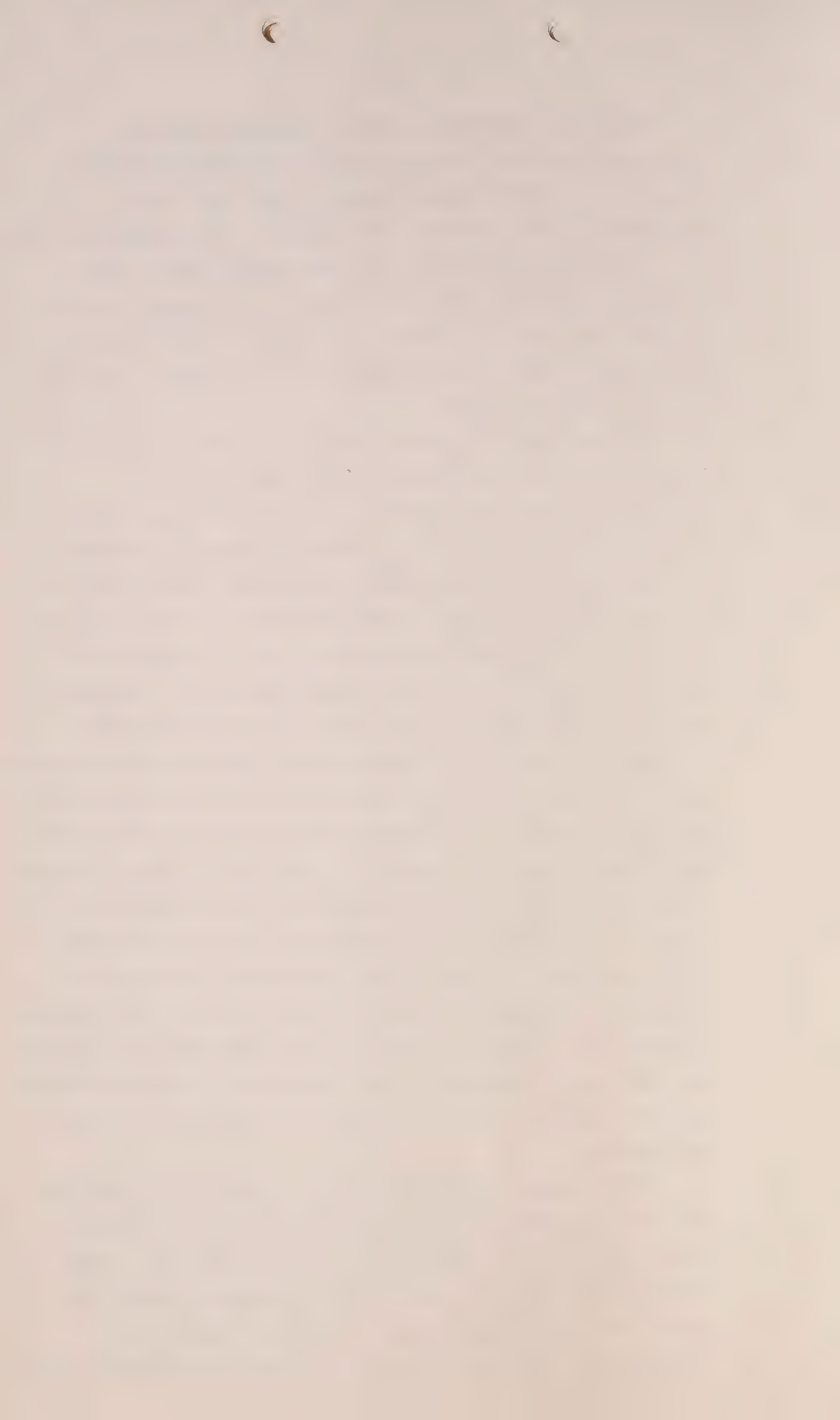
Nonetheless, defendants argue plaintiffs suspected surveillance at the time it occurred and learned of the FBI's involvement in the BUF money demand through media articles published in 1972; therefore, they maintain, all claims are barred.

In support of their argument, defendants state no facts different from those submitted in support of a similar argument in their 1979 motion to dismiss. The Court then held these facts insufficient to warrant dismissal of the case. Memorandum Opinion, November 9, 1979.

The same result should be reached now. First of all, the articles attached to defendants' motion make no mention whatsoever of the FBI's efforts (1) to curtail success of the Poor People's Campaign; (2) to disrupt logistical arrangements and communications at the 1969 counterinaugural demonstrations; (3) to influence American University students to oppose mobilization committee anti-war demonstrations; and (4) to divide SWP and non-SWP members of the NMC Steering Committee. Plaintiffs learned of these claims through the Church Committee reports.

Second, plaintiffs' contemporaneous suspicions of surveillance were not material facts indicating a cause of action against FBI agents. Not only did plaintiffs have no evidence of FBI involvement in the surveillance, but also under Laird v. Tatum, the mere existence of surveillance is not enough. The link between FBI domestic surveillance and COINTELPRO disruption was not known to plaintiffs until the Church Committee reports were released. Moreover, the excessive, unreasonable nature of the surveillance of plaintiffs and the fact the FBI did not believe, even mistakenly, that these investigations were justified by criminal statutes, were not revealed until the FBI produced its voluminous files in this case.

Third, several acts by the FBI to divide the BUF from the NMC were not mentioned in the articles attached to defendants' motion, including the efforts to involve the NWRO, to tarnish the image of Julius Hobson, and to inflame prejudice through the racist "Zulu King," and "Bananas" leaflet. These distinct, tortious acts were learned through discovery, investigation, and



examination of documents in the FBI reading room after suit was filed. (These documents were not publicly available more than three years prior to the filing of the complaint.) Furthermore, when plaintiffs sought discovery premised on the allegations in the portions of the articles pertaining to the BUF and the NMC, the FBI's response failed to confirm the allegations. Defendant Webster's Response to Plaintiffs' Tenth Set of Interrogatories, filed March 9, 1981, at Response 1. Clearly, the articles, alone, were no adequate basis for commencing legal action, where the suit challenges covert acts, and proof of the case depends on discovery from the defendants.

Defendants' motions should be denied.

Anne Pilsbury
Anne Pilsbury
17 Danforth Street
Norway, Maine 02468
(207) 925-1144

J. E. McNeil
J. E. McNeil

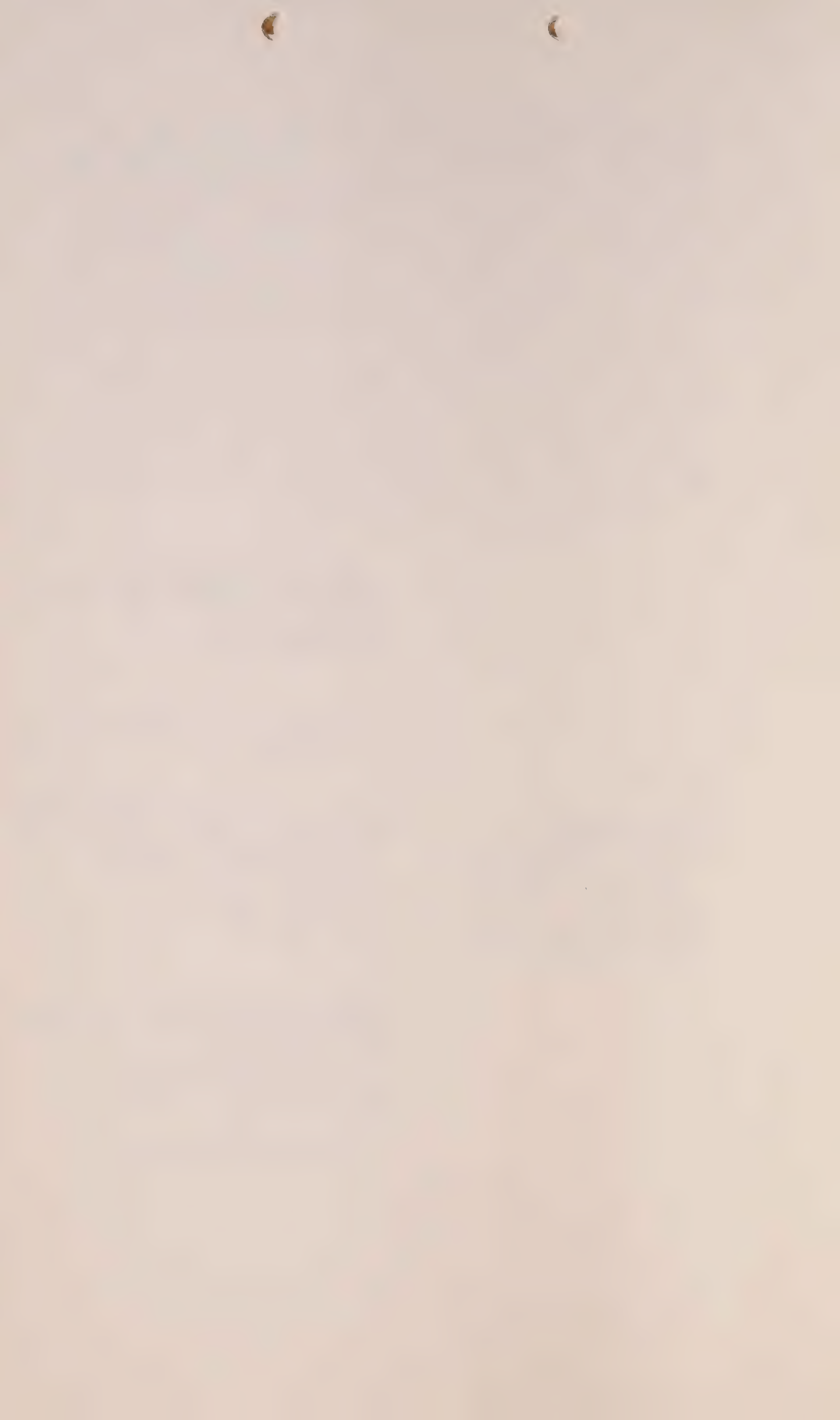
Of Counsel:

Arthur Spitzer
Executive Director
American Civil Liberties
Union Fund of the
National Capital Area
Suite 301
600 Pennsylvania Ave., S.E.
Washington, D.C. 20003
(202) 544-1076

Daniel M. Schember
Daniel M. Schember
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
Attorneys at Law
1712 N Street, N.W.
Washington, D.C. 20036
(202) 223-9274

Herb Semmel
Herb Semmel
Urban Law Institute
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009
(202) 265-9500

Attorneys for Plaintiffs



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

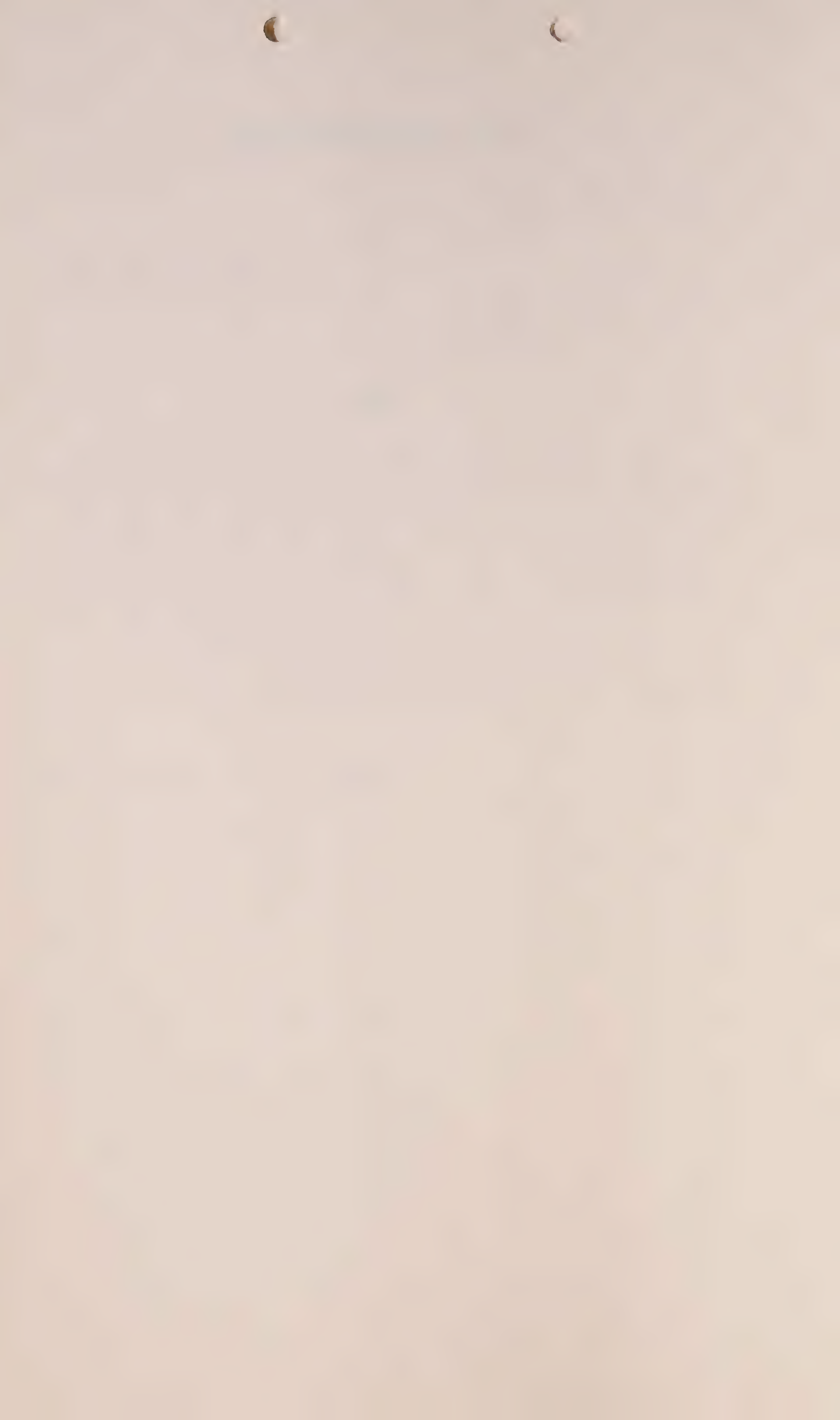
JULIUS HOBSON, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action No. 76-1326
)	
JERRY WILSON, <u>et al.</u> ,)	
)	
Defendants.)	

ORDER

Upon consideration of defendants' motion by federal defendants for judgment on the pleadings and motion by defendant Gerould Pangburn for judgment on the pleadings and plaintiffs' opposition thereto, and it appearing that such motions should be denied, it is this _____ day of _____, 1981

ORDERED that the motion by federal defendants for judgment on the pleadings and motion by defendant Gerould Pangburn for judgment on the pleadings be and hereby are denied.

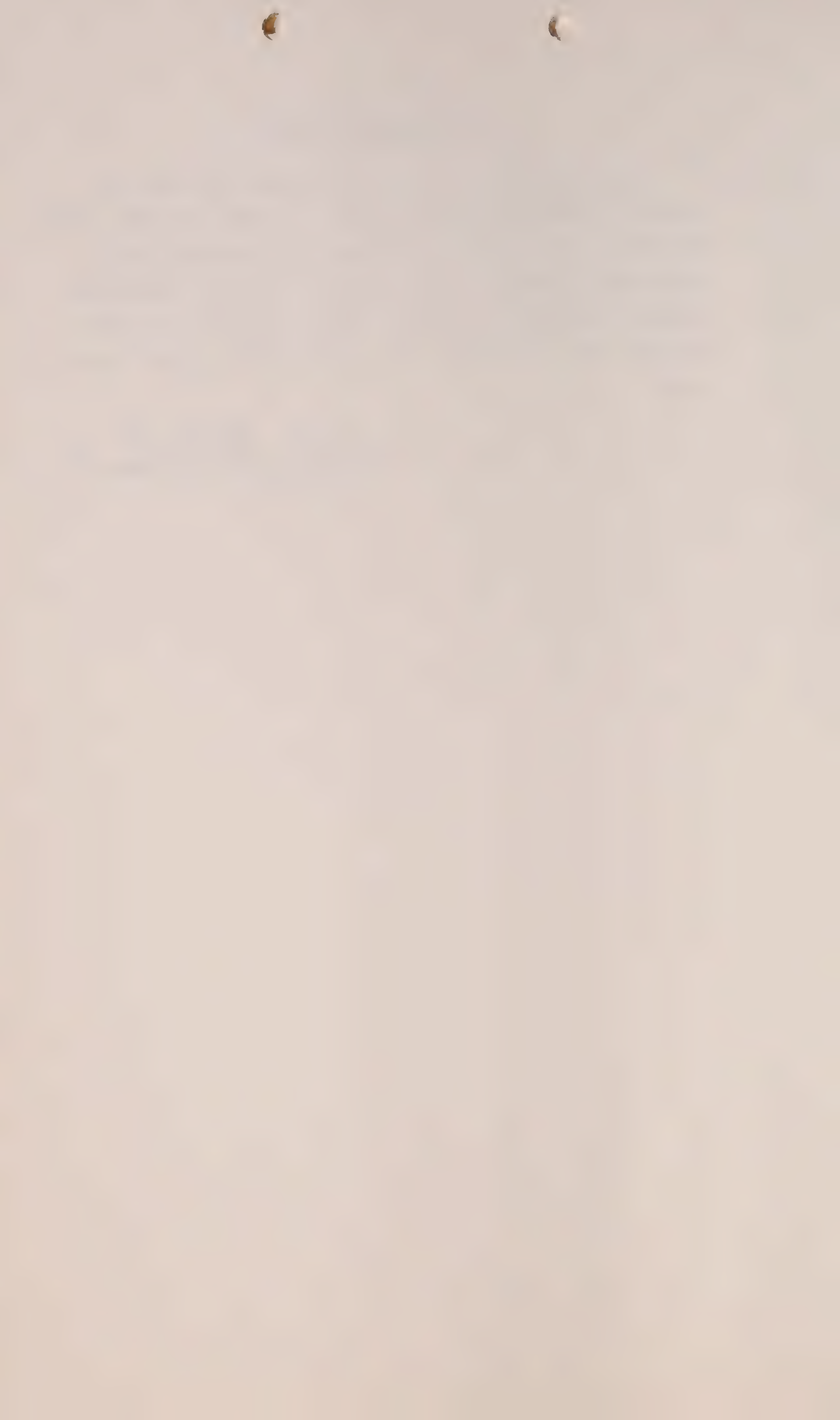
JUDGE



CERTIFICATE OF SERVICE

I certify that a copy of the foregoing opposition to motions by defendants Brennan, Moore, Grimaldi, Pangburn, Jones and Webster and proposed order was mailed to David White, Department of Justice, Washington, D.C. 20530 and Laura Bonn, Assistant Corporation Counsel, District Building, 14th and E Streets, N.W., Washington, D.C. 20004 this 5th day of October, 1981.

J. E. McNeil
J. E. McNeil



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, <u>et al.</u> ,)	
)	
Plaintiffs)	
)	
v.	)	Civil Action No. 76-1326
)	
JERRY WILSON, <u>et al.</u> ,)	
)	
Defendants.)	

MOTION FOR LEAVE FOR VOLUNTARY DISMISSAL
OF CERTAIN FEDERAL DEFENDANTS

Plaintiffs, under Rule 41(a)(2) of the Federal Rules of Civil Procedure, move this Court to grant them leave for voluntary dismissal of the following defendants: Robert Kunkel, Terry T. O'Connor, Charles Sawyer, Robert Yates, Robert Feuer, David Rarity, Peter Gullota, Jr., Joseph Keller, Hilmer Krebs, Paul Lamberth, Robert Olmert, Edward Rudiger, John Stanley, Edwin Waite, and Clarence Kelley.

In support of this motion plaintiffs rely on the accompanying memorandum.

Respectfully submitted,

Anne Pilbury
Anne Pilbury
17 Danforth Street
Norway, Maine 02468
(207) 925-1144

Of Counsel:

S. E. McNeil
J.E. McNeil

Arthur Spitzer
Executive Director
American Civil Liberties
Union Fund of the
National Capital Area
Suite 301
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 544-1076

Daniel M. Schember
Daniel M. Schember
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
Attorneys at Law
1712 N Street, N.W.
Washington, D.C. 20036
(202) 223-9274

Herb Semmel

Herb Semmel
Urban Law Institute
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009
(202) 265-9500

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

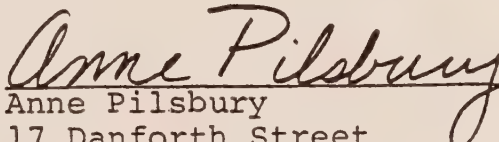
JULIUS HOBSON, et al.,)
)
 Plaintiffs,)
)
 v.) Civil Action No. 76-1326
)
JERRY WILSON, et al.,)
)
)
 Defendants.)

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE
TO VOLUNTARY DISMISSAL OF CERTAIN FEDERAL DEFENDANTS

Although plaintiffs believe that the record before this Court indicates that few, if any, of these defendants are totally blameless in the conspiratorial acts directed at plaintiffs, plaintiffs also believe that justice is not best served by continuing their litigation against defendants who had the more minor roles.

WHEREFORE, plaintiffs pray that their motion for leave for voluntary dismissal of certain Federal defendants be granted.


Respectfully submitted,



Anne Pilsbury
17 Danforth Street
Norway, Maine 02468
(207) 925-1144

Of Counsel:

Arthur Spitzer
Executive Director
American Civil Liberties
Union Fund of the
National Capitol Area
Suite 301
600 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 544-1076



J.E. McNeil



Daniel M. Schember

Daniel M. Schember
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
Attorneys at Law
1712 N Street, N.W.
Washington, D.C. 20036
(202) 223-9274

Herb Semmel

Herb Semmel
Urban Law Institute
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009
(202) 265-9500

Attorneys for Plaintiffs



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action No. 76-1326
)	
JERRY WILSON, <u>et al.</u> ,)	
)	
Defendants.)	

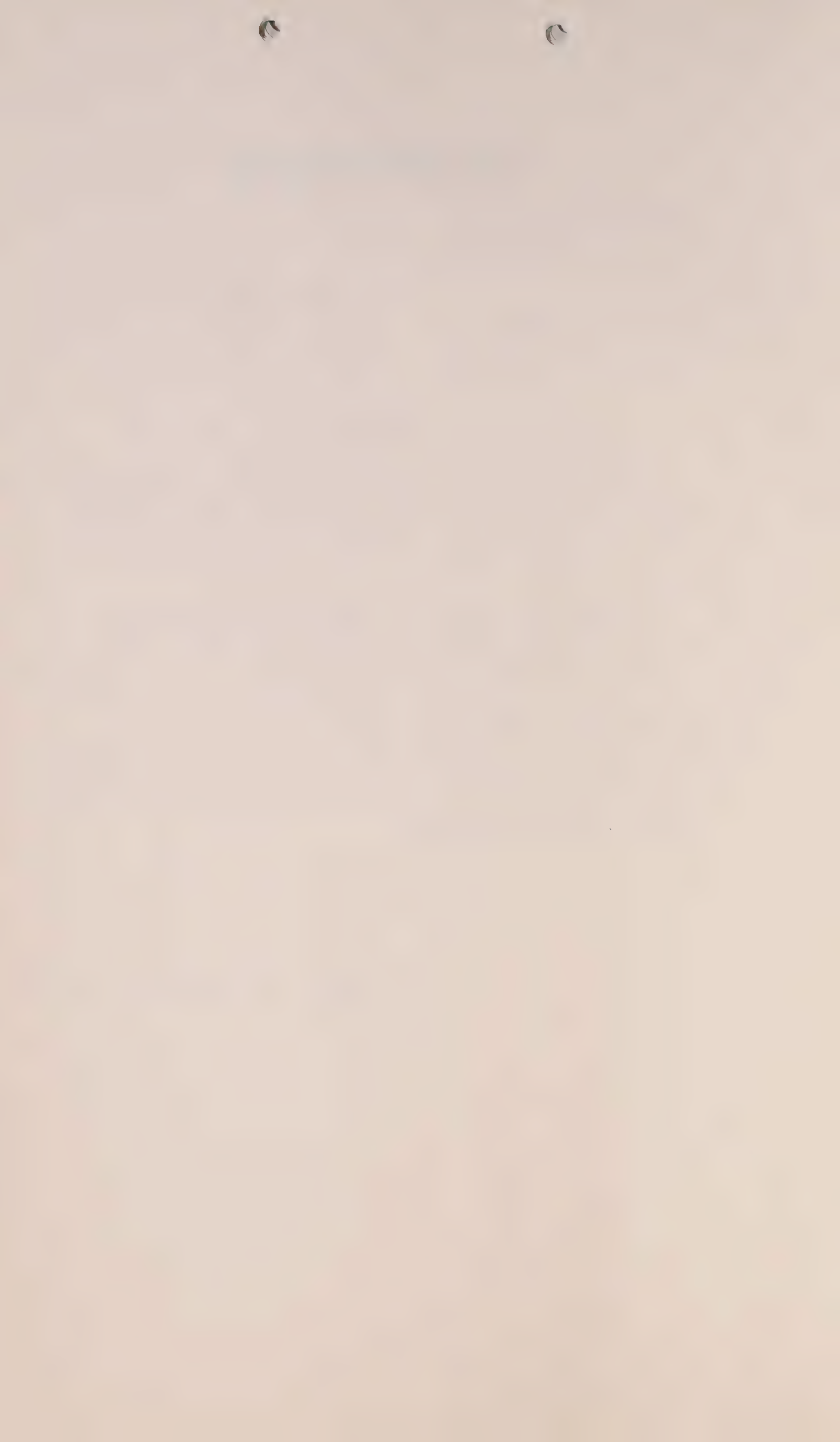
ORDER

Upon consideration of plaintiff's motion for leave for voluntary dismissal of certain defendants, and it appearing that such motion should be granted, it is this _____ day of _____ 1981

ORDERED that plaintiff's motion for leave to voluntary dismissal of certain federal defendants be granted, and further,

ORDERED that defendants Robert Kunkel, Terry T. O'Connor, Charles Sawyer, Robert Yates, Robert Feuer, David Rarity, Peter Gullota, Jr., Joseph Keller, Hilmer Krebs, Paul Lamberth, Robert Olmert, Edward Rudiger, John Stanley, Edwin Waite, and Clarence Kelley be dismissed.

JUDGE



CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion for leave for voluntary dismissal of certain federal defendants, memorandum in support, and proposed order was mailed to David White, Department of Justice, Washington, D.C. 20530 and Laura Bonn, Assistant Corporation Counsel, District Building, 14th and E Streets, N.W. Washington D.C. 20004 this 5th day of October, 1981.

S. E. McNeil

J. E. McNeil

UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY WILSON, et al. :
Defendants :

ANSWERS OF DEFENDANT DISTRICT OF COLUMBIA TO PLAINTIFF'S
THIRTEENTH SET OF INTERROGATORIES

John J. Bourbon, having been first duly sworn under oath, deposes and says that he is an Investigator, Office of the Corporation Counsel, District of Columbia Government and on knowledge, information and belief, gives the following answers to Interrogatories propounded to the defendant, District of Columbia, by the plaintiff:

1. Please state the name, job title, department and business address of each person who was consulted or who participated in any way in responding to Plaintiffs' Third Request for Production of Documents.

Mr. Bob Deso had helped prepare the response to plaintiffs' third request for production of documents. His address is unknown at the present time.

2. Please state all acts each person named in your response to interrogatory 1 above did in connection with responding to plaintiffs' third request for production of documents, including all locations searched.

Unknown.

3. Please state the policies of the District of Columbia and any pertinent department regarding the retention and filing of each of the types of documents requested in plaintiffs' third document request, including the locations where such documents are normally kept.

Unknown, but probably kept at Suitland Record Center,

4. Please state why only the documents previously produced in IPS v. Mitchell can be produced in response to plaintiffs' third document request.

The documents referred to in the IPS v. Mitchell case are the only existing documents.

5. Please state whether documents requested in plaintiffs' third document request, but not produced, were destroyed, and if so please state the date they were destroyed, the names, job titles, departments, and business addresses of the persons who participated in any way in destroying them, the documents that were destroyed, and the policy or authority under which the destruction was authorized.

The documents were destroyed in early 1974. Mention to this can be found in the Affidavit, filed by Officer Zink. See also affidavit of Chesser and Drummond perviously filed.

6. Please state whether any current guidelines, rules, regulations or policies exist regarding Metropolitan Police Department activities formerly falling within the responsibility of the old Intelligence Division, and if so, state the reason they were not produced.

All the guidelines, rules, etc., can be found in General Order 304.11.

7. Please state the reasons why some, but not all, of the written statements and supplemental statements requested in request 1a of plaintiffs' third document request were produced, and why other written statements and supplemental statements are not available.

On information and belief all material has been furnished.

8. Please state the original locations of the documents that were collected for production on discovery in IPS v. Mitchell and state whether those locations were checked in responding to plaintiffs' third document request.



23 boxes of the documents were kept at Suitland Record Center. At this time we have only a copy of the index concerning these documents. The documents were destroyed following a defeated motion to compel in 1978 before Judge Ribercomb.

14

JOHN J. BOURBON

Subscribed and sworn to before me this ____ day of October, 1981.

NOTARY PUBLIC, D.C.

My Commission expires: _____.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answers of Defendant District of Columbia to Plaintiff's Thirteenth Set of Interrogatories, was mailed, postage prepaid, to Daniel M. Schember, Esq., Attorney for Plaintiffs, 1712 N Street, N.W., Washington, D.C. 20036, this ____ day of October, 1981.

14
Assistant Corporation Counsel, D.C.
Attorneys for Defendant District
of Columbia
District Building
Washington, D.C. 20004
727-6348.

UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY WILSON, et al. :
Defendants :

ANSWERS OF DEFENDANT DISTRICT OF COLUMBIA TO PLAINTIFF'S
FOURTEENTH SET OF INTERROGATORIES

John J. Bourbon, having been first duly sworn under oath, deposes and says that he is an Investigator, Office of the Corporation Counsel, District of Columbia Government and on knowledge, information and belief, gives the following answers to Interrogatories propounded to the defendant, District of Columbia, by the plaintiff:

1. Please state the current residential and business addresses for each person who is not a defendant in this action and who was named in your response to interrogatory 1 of plaintiffs' eighth set of interrogatories.

Mr. Jack L. Acree, 9702 Dorval Ave., Upper Marlboro, Maryland 20870; Mr. Edward W. Clouse, 1014 Prince Street, Erwin, Tenn. 37650; Mr. Paul W. Chesser, 2955 S. Columbus Street, Arlington, Virginia 22206; Mr. Warren L. Hurlock 1900 S. Eads Street, Apt. 508, Arlington, Virginia 22202; Mr. George C. Awkard, 8408 Dunbar Ave., Landover, Md. 20785; Mr. Paul J. Brennen, 2925 Graiglawn Road, Silver Spring, Md. 20904; Mr. Melvin Hardy, 3913 20th Place, Hillcrest Heights, Md. 20031; Mr. Richard E. Pearson, 4151 S. Four Mile Run Drive, Apt. 30, Arlington, Virginia 22204; Mr. John J. Zelloe, 4704 Rerch Place, Alexandria, Va. 22309; Mr. Lester N. Crockett, 124 Ingraham Street, N.W., Washington, D.C. 20011; Mr. Blanco Drummond, Jr., 3609 Tyrol Drive, Landover, Md. 20785; Mr.

John D. Jackson, 2704 Kelner Drive, Landover, Md. 20785; Mr. Fred Barber, 6015 Coffey Woods Court, Burke, Va. 22015; Mr. Harold Eversley, 2627 Otis Street, N.E., Washington, D.C. 20018; Mr. David D. Boccabella, 706 S.W. 52nd Street, Cape Coral, Fla. 33904; Mr. Bartholomew D. Daly, 4403 Orangewood Lane, Bowie, Md. 20715; Mr. Jon Allen Prosek, 110 Shawnee Lane, Waldorf, Md. 20601; and Mr. C. Oglesby; Gildon Dixie, Cf., Liaison Branch, OGC; Harding, J.F., Special Officer Section, Inv. Serv.; Mahoney, J.W. 5D; Scraper, C.J., 1D; Lt. Torres, R.N., Gambling; Lt. Twyman, J.W., Traffic Div.; Sgt. Bailey, W.H., Inv. Serv. (detailed DEA); Maul, J.W., Inv. Serv.; Tiede, D.E., Inv. Serv.

2. Please state the current residential and business addresses for the person referred to as Det. Roger A. Johnson in attachment A accompanying these interrogatories.

Roger A. Johnson, Invest. Services Division, Metropolitan Police Department, Washington, D.C.

Object to release to home address.

3. Please state the name and current business and residential addresses for the person identified in attachment A as "formerly a high ranking official of the police department [who] said the intelligence division routinely exchanged information with the Central Intelligence Agency."

Unknown.

4. Please state the current residential and business addresses for "Charles Robinson" referred to in plaintiffs' exhibit 11 to the deposition of Donald Campbell, a copy of which is attached.

Charles W. Robinson, Alcohol, Tobacco and Firearms U.S. Treasury, Glenco, Georgia.

5. Please state the complete name and current business and residential addresses for the person referred to as "Carlson" in the attached exhibit 11 to the Campbell



deposition.

Unknown.

6. Please state the current residential and business addresses for Edward Spiker and Thomas Okeson, both present or former members of the Metropolitan Police Department.

Thomas Okeson c/o Robert H. Okeson, Crystal Lake, Illinois 60014 and Edward Spiker is unknown.

JOHN J. BOURBON

Subscribed and sworn to before me this ____ day of October, 1981.

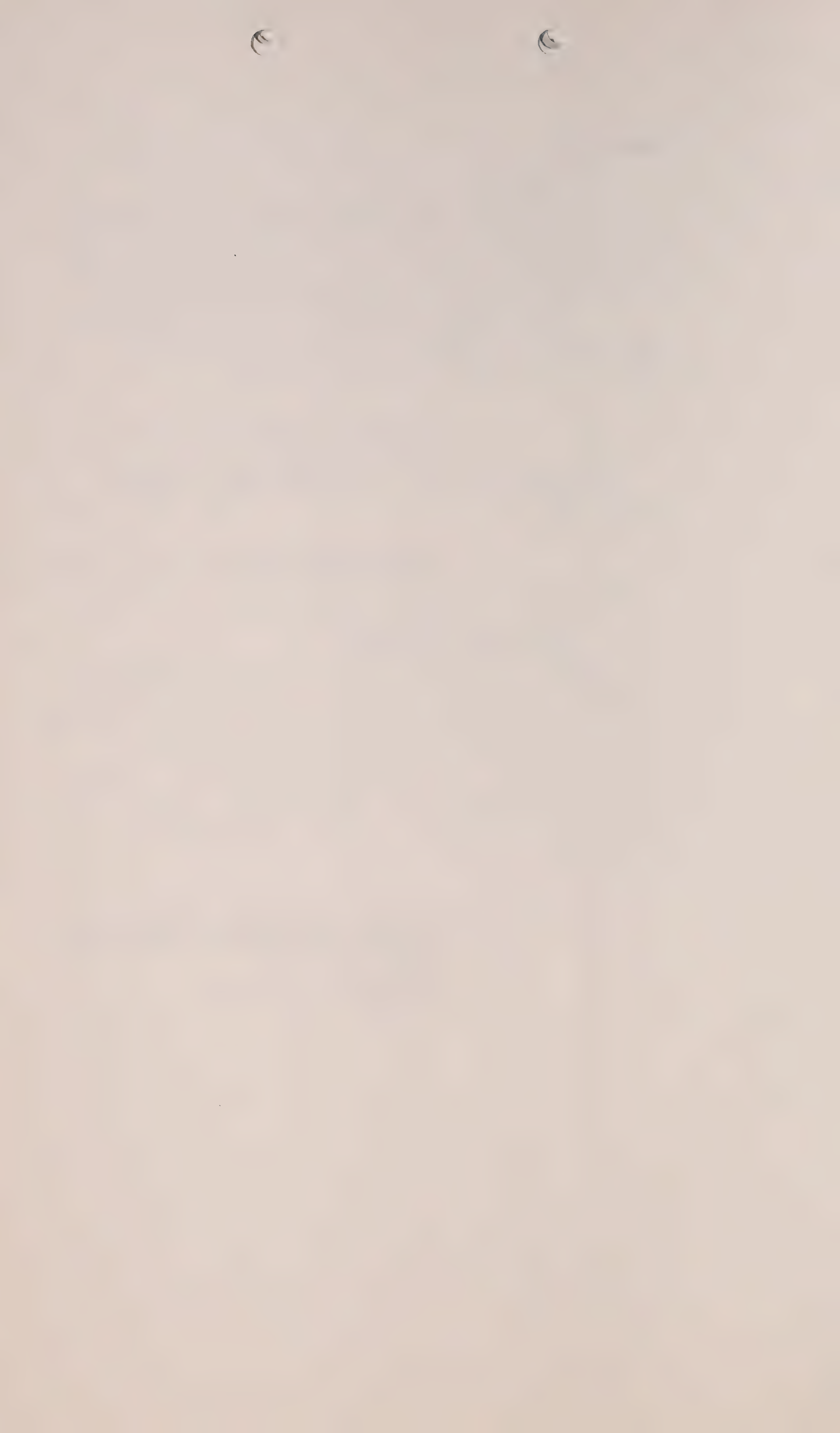
NOTARY PUBLIC, D.C.

My Commission expires: _____.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answers of Defendant, District of Columbia, to Plaintiff's Fourteenth Set of Interrogatories was mailed, postage prepaid, to Daniel M. Schember, Esq., Attorney for Plaintiffs, 1712 N Street, N.W., Washinton, D.C. 20036, this ____ day of October, 1981.

Assistant Corporation Counsel, D.C.
Attorneys for Defendant District of
Columbia
District Building
Washington, D.C. 20004
727-6348



UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
)	

MEMORANDUM BY FEDERAL DEFENDANTS IN
RESPONSE TO MOTION FOR VOLUNTARY DISMISSAL
OF CERTAIN FEDERAL DEFENDANTS

Plaintiffs have moved, pursuant to Rule 41(a)(2), Federal Rules of Civil Procedure, to dismiss voluntarily fifteen defendants: Clarence Kelley, Robert Kunkel, Terry T. O'Connor, Charles Sawyer, Robert Yates, Robert Feuer, David Rarity, Peter Gulotta, Joseph Keller, Hilmer Krebs, Paul Lamberth, Robert Olmert, Edward Rudiger, John Stanley, and Edwin A. Waite. At the time plaintiffs filed their motion, motions for judgment on the pleadings were pending for all except Robert Olmert. Plaintiffs have not opposed these motions.* /

Although abandoning their claims, plaintiffs make the gratuitous and demeaning comment that the defendants engaged in culpable conduct. This allegation, as are all others that have been made by plaintiffs against these persons, is false. It is appropriate for this Court to enter judgment in favor of these defendants, and a proposed order is being submitted.

These defendants do not waive their right to seek appropriate costs and attorney fees.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney

* / On October 5, 1981, plaintiffs filed a memorandum in opposition to defendant Gerould Pangburn's motion for judgment on the pleadings and in opposition to a motion by all federal defendants arguing that the action is barred by the applicable statute of limitations. Plaintiffs previously filed an opposition to the motion by defendant Courtland Jones for judgment on the pleadings.

Brook Hedge
BROOK HEDGE

David H. White
DAVID H. WHITE

Attorneys, Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for defendants Kelley,
Kunkel, O'Connor, Sawyer, Yates,
Feuer, Rarity, Gulotta, Keller, Krebs
Lamberth, Olmert, Rudiger, Stanley,
and Waite

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
)	

ORDER

This cause having come before the Court on motions by several defendants for judgment on the pleadings and motion by plaintiffs for voluntary dismissal of certain defendants, and the Court being fully advised in the premises, it is this _____ day of October, 1981,

ORDERED that judgment on the merits be entered in favor of defendants Clarence M. Kelley, Robert Kunkel, Terry T. O'Connor, Charles Sawyer, Robert Yates, Robert Feuer, David Rarity, Peter Gulotta, Joseph Keller, Hilmer Krebs, Paul Lamberth, Robert Olmert, Edward Rudiger, John Stanley, and Edwin Waite.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 1981, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Memorandum By Federal Defendants In Response To Plaintiffs' Motion For Voluntary Dismissal of Certain Federal Defendants, and proposed Order.

Herb Semmel, Esquire
Urban Law Institute for the
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009

Anne Pilsbury, Esquire
17 Danforth Street
Norway, Maine 04268

Laura Bonn, Esquire
Assistant Corporation Counsel
District Building
14th and E Streets, N.W.
Washington, D.C. 20004

Daniel Schember, Esquire
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
1712 N Street, N.W.
Washington, D.C. 20036

1

DAVID H. WHITE
Attorney, Department of Justice
Washington, D.C.

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

RECEIVED SEP 14 1979

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
)	

REPLY MEMORANDUM IN SUPPORT OF MOTION
BY DEFENDANT COURTLAND J. JONES TO DISMISS

Plaintiffs have opposed defendant Jones' motion to dismiss by arguing that two of his defenses were disposed of by a previous ruling of this Court and that the third defense, plaintiffs' failure to prosecute, is essentially without merit. This memorandum replies to these contentions.

In the Memorandum Opinion of November 9, 1979, this Court denied that part of the federal defendants' motion to dismiss grounded on the proposition that the complaint failed to set forth a short and plain statement of the claim showing that plaintiffs were entitled to relief. The Court agreed, however, that "the complaints are lacking in the detail which would permit defendants to respond to specific allegations of misconduct." (Slip Opinion, at 3). Inasmuch as defendant Jones has been brought into this action virtually on the eve of trial, following five years of discovery, he is entitled to know what the claims are against him. The complaint fails in this regard and as to defendant Jones it should be dismissed.

Also in the opinion of November 9, 1979, the Court denied that part of the federal defendants' motion arguing that the action was barred by the statute of limitations. The denial was, however, without prejudice, and defendant Jones is entitled to renew this argument, which is applicable to all of the federal defendants, on the basis of the additional facts obtained through discovery. The record of this action and the exhibits attached to defendant Jones' motion to dismiss establish that more than three years

prior to the commencement of this action plaintiffs possessed the material facts to form the basis for intelligent prosecution of their claims. This conclusion is irrefutable, and the action should be dismissed.

Finally, plaintiffs argue that defendant Jones suffered no prejudice by their failure to effect service of process on him until 3 1/2 years after he was added as a defendant and with only forty days prior to the close of discovery.*/ In Anderson v. Air West, Inc., 542 F.2d 522 (9th Cir. 1976), a case which plaintiffs cite in support of their opposition, the court affirmed a dismissal with prejudice where the delay in service of process was one year following the filing of the complaint. The court noted that "[t]he law presumes injury from unreasonable delay," 542 F.2d at 524, and plaintiff was unable to rebut that presumption. The court also commented that delay in service of process is particularly serious because all the defendant's preparations are adversely affected. Moreover, where the statute of limitations has run, a defendant who has not been served justifiably may expect that he will not be required to defend against the claim. "If service can be delayed indefinitely once the complaint is filed within the statutory period, these expectations are defeated and the statute of limitations no longer protects defendants from stale claims." 542 F.2d at 525.

With respect to the instant motion to dismiss, the following comments are appropriate:

1. Plaintiffs knew at all times where defendant Jones resided and could have effected service without difficulty. Their failure to do so was, therefore, willful, and defendant Jones was entitled to expect that the claim had been abandoned.

2. Pursuant to the previous orders of this Court, discovery terminated on July 31, 1981, exactly forty days after defendant Jones was served with process. Consequently, defendant Jones would have been required to initiate and complete his discovery twenty days before the date, August 20, 1981, on which he was required to respond to the complaint. This is significant prejudice.

*/ Notably absent from plaintiffs' memorandum is any explanation for this extraordinary delay in serving process on defendant Jones.

3. Plaintiffs' took the deposition of Mr. Jones as a witness on May 5, 1981, pursuant to subpoena personally served on him. Plaintiffs thus enjoyed full discovery from him but by purposefully waiting until just prior to the close of discovery to serve him with the amended complaint deprived him of the opportunity to prepare his defense and pursue discovery in his own behalf. Plaintiffs' conduct in this regard should not be tolerated by this Court.

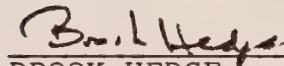
Conclusion

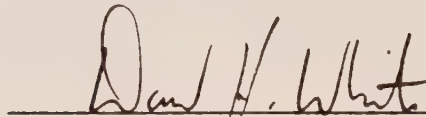
For the foregoing reasons, and for the reasons stated in the memorandum in support of the motion, defendant Jones' motion to dismiss should be granted.

Respectfully submitted,

STUART E. SCHIFFER
Acting Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney


BROOK HEDGE


DAVID H. WHITE

Attorneys, Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for defendant
Courtland J. Jones



CERTIFICATE OF SERVICE

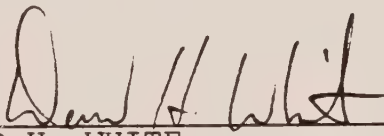
I hereby certify that on this 10th day of September, 1981,
I have served upon each counsel, by mailing postage prepaid, one
copy of the foregoing Reply Memorandum In Support Of Motion By
Defendant Courtland J. Jones To Dismiss.

Herb Semmel, Esquire
Urban Law Institute for the
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009

Anne Pilsbury, Esquire
17 Danforth Street
Norway, Maine 04268

Laura Bonn, Esquire
Assistant Corporation Counsel
District Building
14th and E Streets, N.W.
Washington, D.C. 20004

Daniel Schember, Esquire
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
1712 N Streets, N.W.
Washington, D.C. 20036



DAVID H. WHITE
Attorney, Department of Justice
Washington, D.C. 20530



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.

Plaintiffs,

v.

JERRY WILSON, et al.

Defendants.

)
)
)
)
)
)
)
)
)
)

Civil Action No. 76-1326

PLAINTIFFS' PRETRIAL BRIEF

I. LIST OF WITNESSES

dey *Jack Acree will testify about his activities on the Intelligence Division of the Metropolitan Police Department (MPD). 1 to 1-1/2 hours.

ti *Sammie Abbott will testify about his political activities and the activities of the organizations in which he played an active part, in particular the Emergency Committee on the Transportation Crisis (ECTC) and the Black United Front (BUF). He will also testify concerning agents provocateur at the Three Sisters Bridge and undercover officers Ed Jagen and Harold Bynum. 2 to 3 hours.

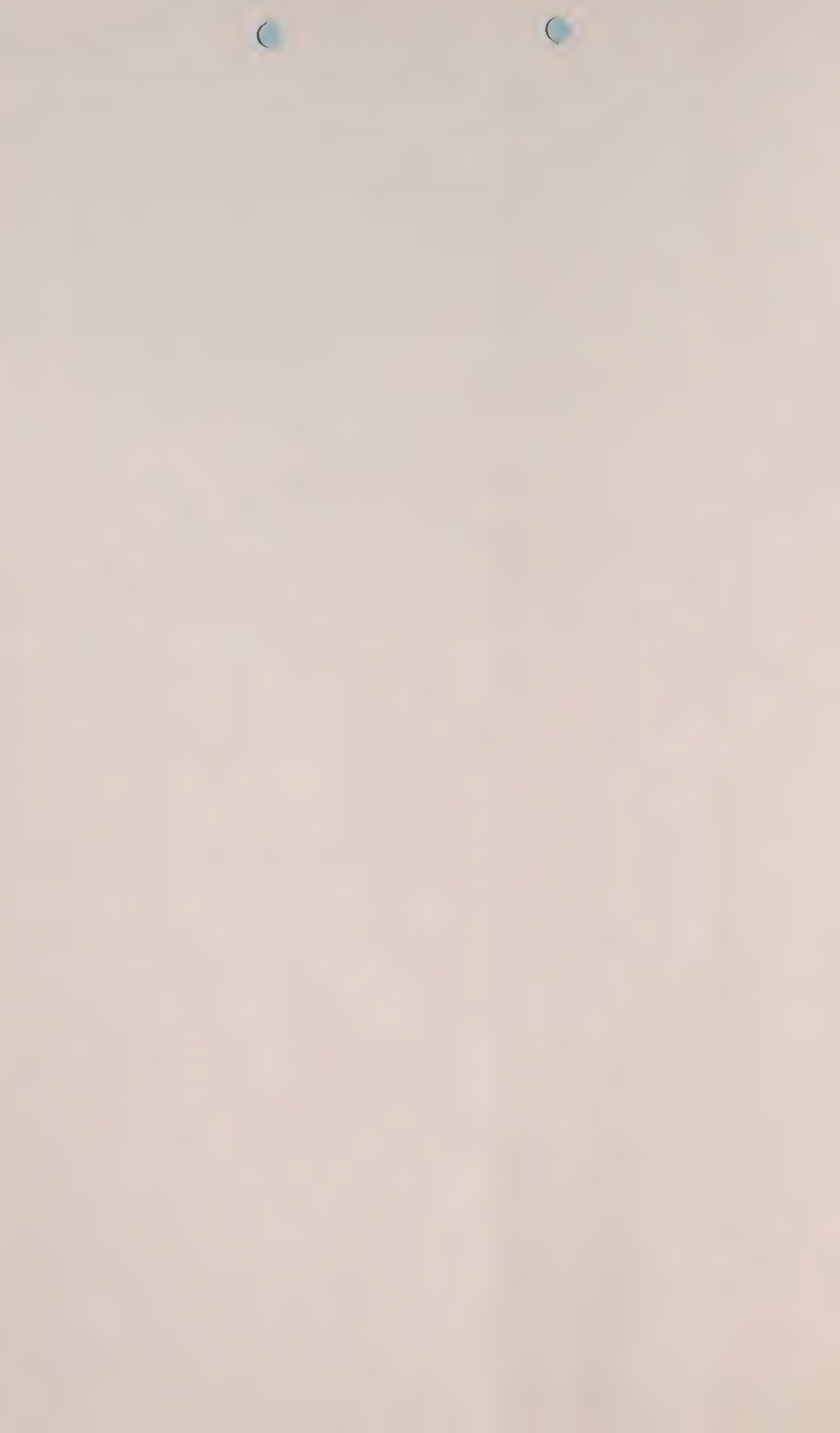
→ Alex Jay will testify about the effects of the Rational Observer at American University. 45 minutes to an hour.

→ *Stu Albert will testify about Anne Kolego and Peoples' Coalition for Peace and Justice (PCPJ). 1 to 1-1/2 hours.

→ John T. Aldhizer will testify concerning his racial matters domestic intelligence investigations and Counterintelligence Program (COINTELPRO) activities, in particular those directed at BUF. 2 to 3 hours.

→ *Matt Andrea will testify concerning ECTC and the Three Sisters Bridge dispute. 1 to 1-1/2 hours.

~~Alice Arshak~~ will testify about the New Mobilization Committee (NMC). 45 minutes to an hour.



~~Jan Bailey~~ will testify about BUF and the head-tax. 1 to 1-1/2 hours.

→ William H. Bailey will testify about his activities on the Intelligence Division of MPD. 1 to 1-1/2 hours.

~~Noreen Banks~~ will testify about the Peoples Coalition for Peace and Justice (PCPJ) and Anne Kolego. 1-1/2 to 2 hours.

Barbara Banoff will testify concerning the Church Committee's findings about COINTELPRO. 1 to 1-1/2 hours.

~~Frederick Baron~~ will testify concerning the Church Committee's findings about "black bag" jobs done by the FBI. 45 minutes to an hour.

Chuck Barrett will testify about the Reeses and Waskow's prison reform project. 1 to 1-1/2 hours.

~~Joe Barrett (Eigbee)~~ will testify about his activities as an MPD informant. 1-1/2 to 2 hrs.

→ The Honorable Marion Barry will testify about the nature of ECTC and BUF and about the Three Sisters Bridge. 1-1/2 to 2 hrs.

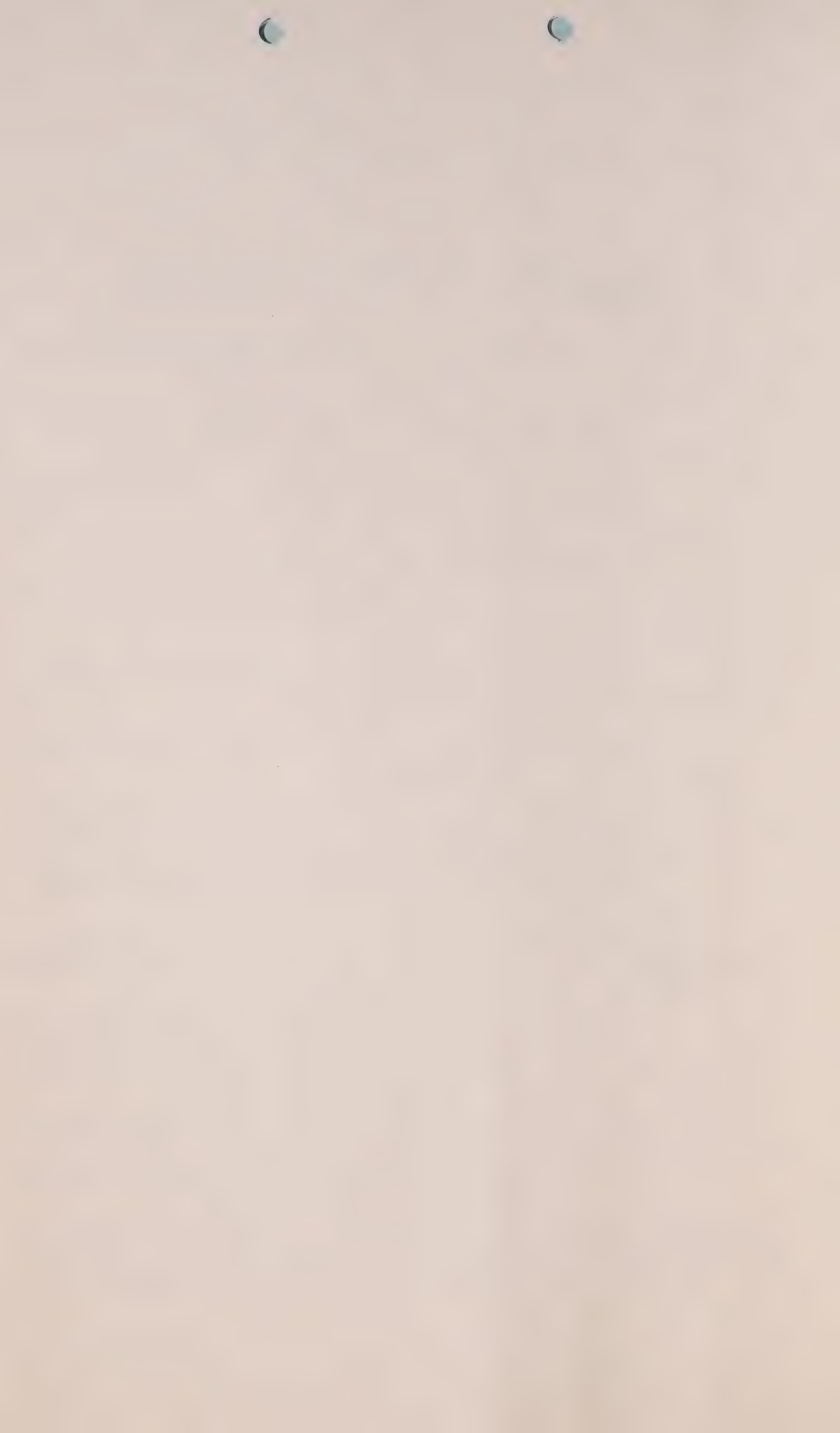
~~Terry Becker~~ will testify concerning Three Sisters Bridge. 1 to 1-1/2 hrs.

→ C. Edward Behre will testify about the nature of Washington Peace Center (WPC). 30 to 45 minutes.

~~Chip Berlet~~ will testify as an expert witness concerning the domestic intelligence operations of the FBI and MPD as well as the use of informants and the Reeses. 2 to 3 hours.

→ Barbara Bick will testify about the nature of Women Strike for Peace (WSP) and activities of Waskow, as well as the invasion of her privacy by an informant. 1-1/2 to 3 hrs.

dep Delores Binsted will testify about being an informant for the MPD and her investigation of Tina Hobson. 1-1/2 to 3 hrs.



~~def~~ James Binsted will testify about being an undercover officer for the MPD and the Three Sisters Bridge dispute. 1-1/2 to 2 hrs.

~~##~~ Abe Bloom will testify about his political activities in the organizations in which he was active, in particular, the WPC, Washington Area Peace Action Coalition, National Peace Action Coalition, and NMC. He will also discuss the invasion of his privacy and the effect of finding his friends were informants. 2 to 3 hours.

~~##~~ Reginald Booker will testify about his political activities in the organizations in which he is active, in particular, ECTC and the BUF. He will also testify about the effects of the FBI interviews on his job at the General Accounting Office. 1 to 2 hrs.

~~Bob Borosage~~, formerly with Center for National Security Studies, will testify as an expert witness concerning domestic intelligence, in particular in the D.C. area. 1-1/2 to 2 hrs.

~~Randy Bregman~~ will testify about PCPJ. 1 to 1-1/2 hrs.

~~def~~ Charles Brennan will testify about the formation of the COINTELPRO and FBI policy. He will also testify about approval of disruptive activities. 2 to 3 hrs.

~~Edward Brooke~~, former Senator for Massachusetts, will testify concerning the Poor People's Campaign (PPC). 1 to 1-1/2 hours.

~~→~~ Richard S. Brooks will testify about the present operations of the special operations division of MPD. 1 to 1-1/2 hrs.

~~Sam Brown~~ will testify about the Vietnam Moratorium Committee (VMC). 1 to 1-1/2 hours.

~~Philip Buchen~~ will testify about Wilson's denial of his appointment to the Drug Enforcement Agency (DEA). 1 to 1-1/2 hrs.

~~def~~ Harold Bynum will testify about his actions as an undercover officer, in particular, in relation to BUF and ECTC and Reginald Booker. 1-1/2 to 2 hrs.

~~→~~ Donald Campbell will testify about his investigation of



illegal activities of the MPD, in particular as relating to 1029 Vermont. 2 to 3 hrs.

~~Larry Canada~~ will testify about phonetaps, Pollock, Anne Kolego, and PCPJ. 1-1/2 to 2 hrs.

→ Mike Canfield will testify about the activities of the intelligence division of the MPD. 1 to 1-1/2 hrs.

~~The Rev. John Carter~~ will testify about "no-knock" and the BUF. 1 to 1-1/2 hrs.

→ Charlie Cassells will testify about BUF, the Rev. Eaton, the PPC, "no-knock", and ECTC. 1-1/2 to 2 hrs.

~~Paul A. Chesser~~ will testify concerning his activities as a supervisor of the Intelligence Division of the MPD. 45 minutes to 1 hr.

~~Mel Kovacs~~ will testify regarding demonstrations at the site of the Three Sisters Bridge.

→ Carol Cullum will testify about PCPJ and Annie Kolego. 2 to 3 hrs.

~~Jack Davis~~ will testify concerning PCPJ and Mayday. 1 to 1-1/2 hrs.

~~Rennie Davis~~ will testify about Anne Kolego, PCPJ, counter-inaugural, the Mayday Collective, and Pollock. 1-1/2 to 2 hrs.

~~Roger O. Day~~ will testify about the activities of the Intelligence Division of MPD. 1 to 1-1/2 hours.

→ Thomas J. Deakin will testify about domestic intelligence and COINTELPRO, in particular COINTELPRO-Black Nationalists. 1 to 1-1/2 hrs.

~~John Deah~~ will testify about the White House relationship to the MPD. 1 to 1-1/2 hrs.

~~Dave Dellinger~~ will testify about the effects of the "head-tax". 1 to 1-1/2 hrs.

~~May DeOreo~~ will testify concerning the Church Committee

report about COINTELPRO activities. 1 to 1-1/2 hours.

→ *Frank Donner will testify as an expert witness on domestic intelligence and its chilling effect. 1 to 1-1/2 hrs.

→ Mike Drobinaire will testify concerning Anne Kolego and PCPJ. 1 to 1-1/2 hrs.

→ *Blanco Drummond will testify concerning the Intelligence Division and the Investigative Division at the MPD. 1-1/2 to 2 hrs.

→ *The Rev. David Eaton will testify concerning his political activities in organizations in which he was active, in particular, the PCC and the BUF. 1-1/2 to 2 hrs.

→ *Gabriel Edgcomb will testify concerning WSP, WPAC, NPAC, and Wascow. 1-1/2 to 2 hrs.

→ ~~John Elliff~~ will testify concerning Church Committee Report findings about warrantless electronic surveillance and the development of FBI Domestic Intelligence. 1-1/2 to 2 hrs.

→ Harry I. Ervin will testify concerning the domestic intelligence racial matters at the FBI and Black Nationalist-COINTELPRO, in particular concerning the BUF and NMC. 1 to 1-1/2 hours.

→ ~~Carol Evans~~ will testify about PCPJ and Mayday. 1 to 1-1/2 hours.

→ ~~Walter Fauntroy~~ will testify about BUF. 1 to 1-1/2 hours.

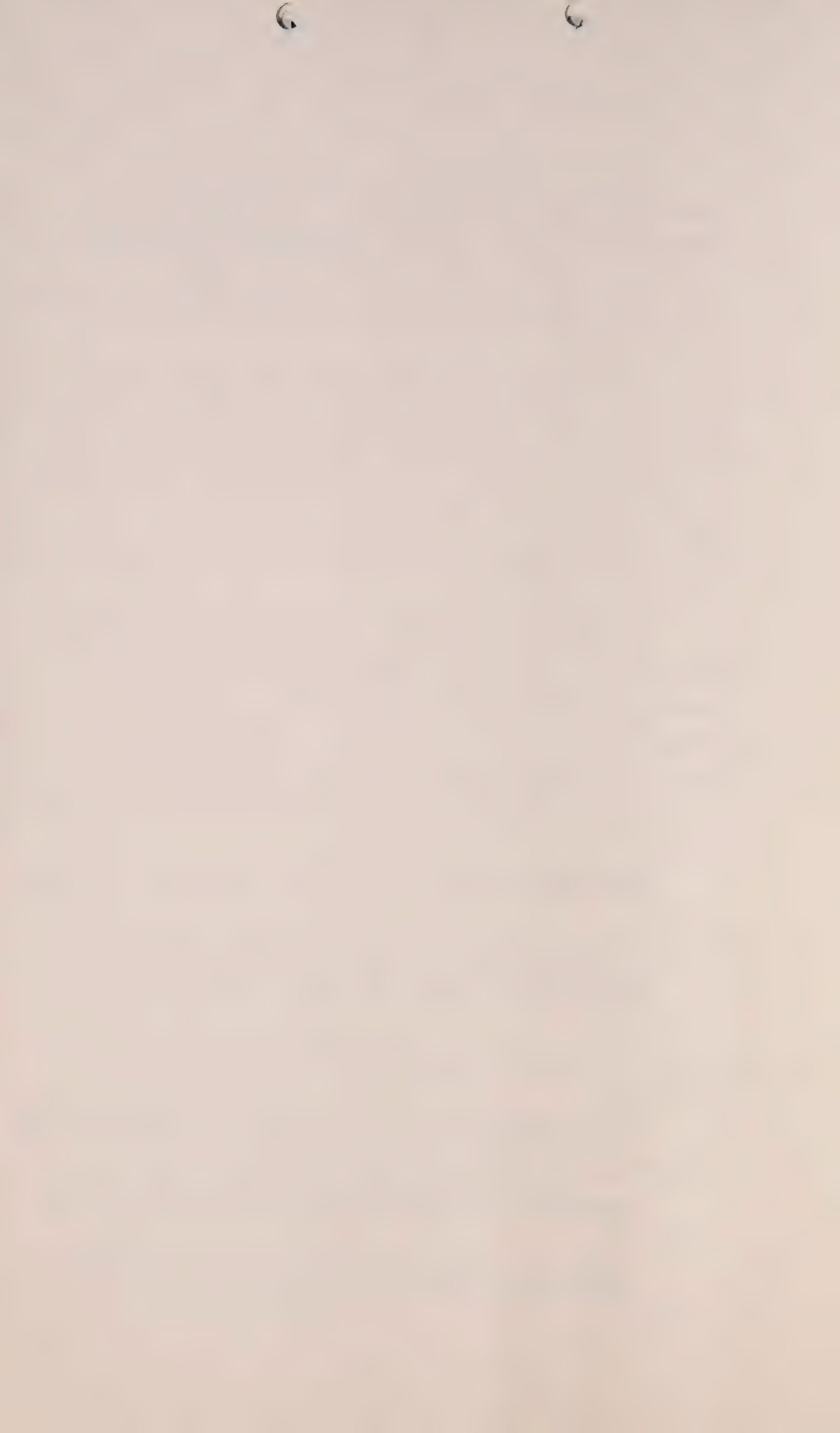
→ ~~Jan Fentey~~ will testify about PCPJ, NPAC and VMC. 1 to 1-1/2 hours.

→ Phil Fentey will testify about PCPJ, NPAC and VMC. 1 to 1-1/2 hours.

→ *~~Albert W. Ferguson~~ will testify about his activities on the Intelligence Division at the MPD. 1 to 1-1/2 hrs.

→ ~~Gordon Finch~~ will testify about informants in PCPJ. 1 to 1-1/2 hours.

→ ~~Vic Fischer~~ will testify about Anne Kolego. 45 minutes to 1 hour.



~~John Fleming~~ will testify about ECTC, wiretaps, the Three Sisters Bridge dispute. 1 to 1-1/2 hrs.

~~James Forman~~ will testify concerning the PCC. 45 min. to an hour.

~~John (Jan) Francis~~ will testify about undercover officers for MPD. 1-1/2 to 2 hrs.

~~Max Friedman~~ will testify about informants in New Left organizations in D.C. 1-1/2 to 2 hours.

~~Eliot Friedson~~ will testify as an expert witness on domestic intelligence and its chilling effect. 1 to 1-1/2 hours.

~~Bob Gaines~~ will testify about activities at 1029 Vermont. 1 to 1-1/2 hours.

→ *Ann Gallivan will testify concerning the counter-inaugural demonstrations and other anti-war activities. 1 to 1-1/2 hours.

~~Eleanor Garst~~ will testify concerning WSP. 45 minutes to 1 hour.

○ *Dixie Gildon will testify concerning her activities on the Intelligence Division of the MPD. 1 to 1-1/2 hrs.

~~Robert Justin Goldstein~~ will testify as an expert witness on domestic intelligence and its chilling effect. 1 to 1-1/2 hours.

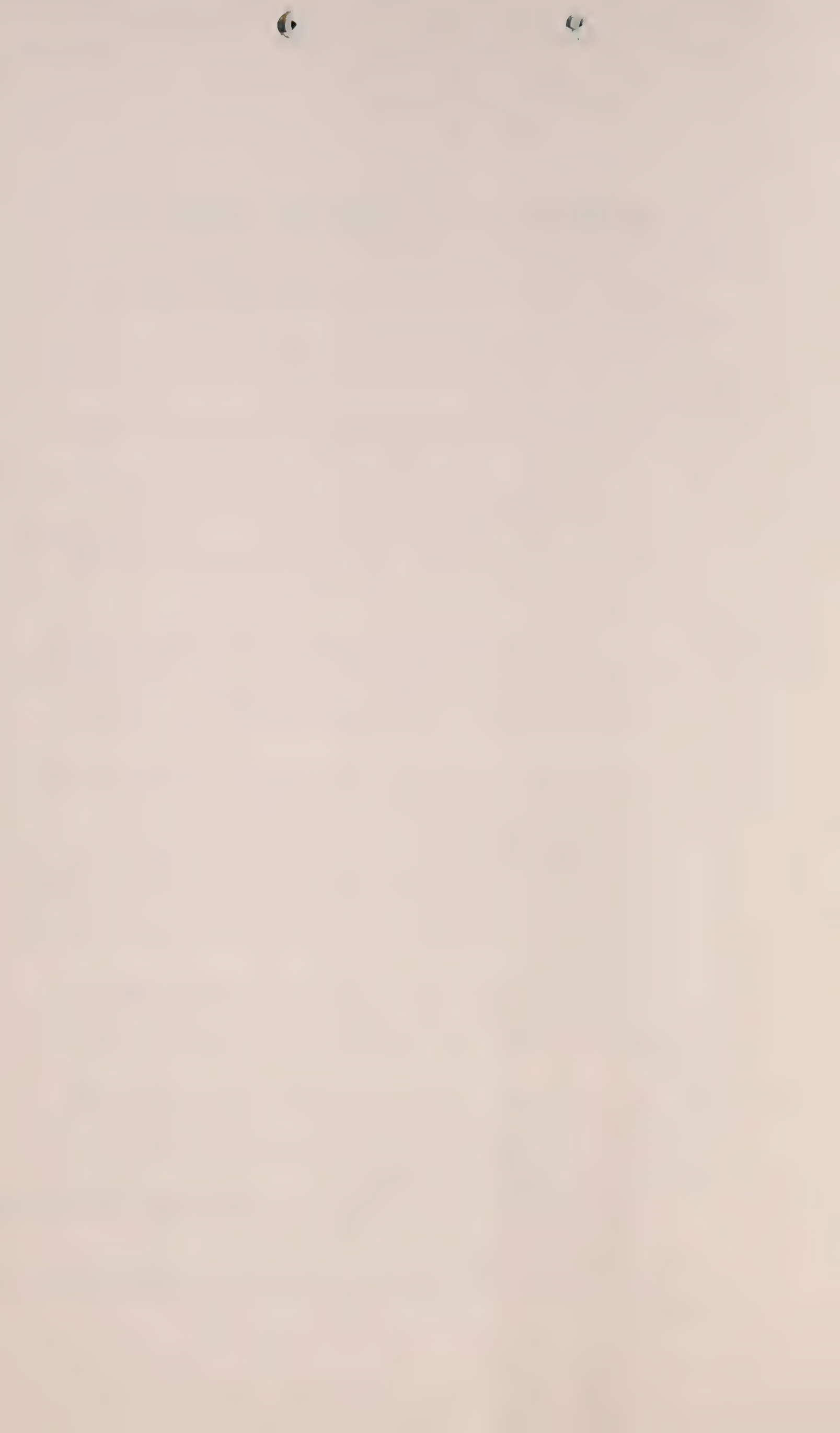
~~Jerry Gordon~~ will testify concerning cut phone wires and NMC. 1 to 1-1/2 hours.

→ *Gerald T. Grimaldi will testify concerning the Rational Observer and his activities as COINTELPRO coordinator. 1-1/2 to 2 hours.

○ Peter A. Gullota, Jr., will testify concerning domestic intelligence and COINTELPRO activities, in particular concerning WPC and Abbott. 1 to 1-1/2 hours.

~~Casey Gurewitz~~ will testify concerning New Left organizations in D.C. 1-1/2 to 2 hours.

→ *Don Gurewitz will testify concerning the Student Mobilization



Committee (SMC) Steve Wilcox, Young Socialist Alliance (YSA), regional and national leadership, and other anti-war activities. 1-1/2 - 2 hours.

→ *Helen Gurewitz will testify concerning the activities of Sammie Abbott, Abe Bloom, Art Waskow, and New Left organizations in D.C. 2 to 3 hours.

*~~Fred Halstead~~ will testify concerning the NMC Steering Committee split, the head-tax, and D.C. New left and black organizations, both as an expert and on his personal knowledge. 2 to 3 hours.

~~John Harding~~ will testify concerning his activities on the intelligence division of the MPD. 1 to 1-1/2 hours.

→ Thomas Herlihy will testify concerning his activities as a supervisor in the intelligence division of the MPD. 1 to 1-1/2 hrs.

~~Phil Hirschkop~~ will testify concerning anti-war demonstrations (1969-75), the counter-inaugural and BUF. 1 to 1-1/2 hours.

→ *Tina Hobson will testify concerning her personal political activities and the organizations in which she was active. 1 to 1-1/2 hours.

~~Tom Huston~~ will testify concerning the White House relation to the MPD. 1 to 1-1/2 hrs.

→ Edward Jagen will testify concerning his activities as an undercover police officer for the MPD. 1 to 1-1/2 hrs.

→ Roger A. Johnson will testify concerning his activities on the Intelligence Division of the MPD. 1 to 1-1/2 hrs.

→ *Courtland Jones will testify concerning domestic intelligence for the FBI and COINTELPRO activities. 2 to 3 hours.

→ Absalom Jordan will testify concerning intimidation and BUF. 45 minutes to 1 hr.

→ David Jordan will testify concerning intimidation from interviews by the FBI. 45 minutes to 1 hour.



~~George Kastiacius~~ will testify concerning the activities of Anne Kolego and other MPD or FBI agents in Miami. 45 min. to 1 hr.

→ ~~Dr~~ Victor Kaufman will testify concerning WPC. 45 min. to 1 hr.

~~Jeffrey Hayden~~ will testify concerning the Church Committee findings about use of informants by the FBI. 45 min. to 1 hr.

~~Joseph Keller~~ will testify concerning domestic intelligence and COINTELPRO activities, in particular Abe Bloom. 1 to 1-1/2 hrs.

~~Robert Kelley~~ will testify concerning the Church Committee report findings about the use of informants in the FBI. 45 min. to 1 hour.

→ Garrett Kirwin, Jr., will testify concerning his activities on the Intelligence Division of the MPD. 1 to 1-1/2 hrs.

→ Carol Kitchens will testify concerning PCPJ and activities at 1029 Vermont and other PCPJ offices. 1 to 1-1/2 hours.

~~Egil Krogh~~ will testify concerning the White House relationship to the counter-inaugural administrations. 1 to 1-1/2 hours.

→ Bob Lamb will testify concerning the counter-inaugural demonstration. 1 to 1-1/2 hours.

→ *Sid Lens will testify concerning the NMC and BUF head-tax. 1 to 1-1/2 hours.

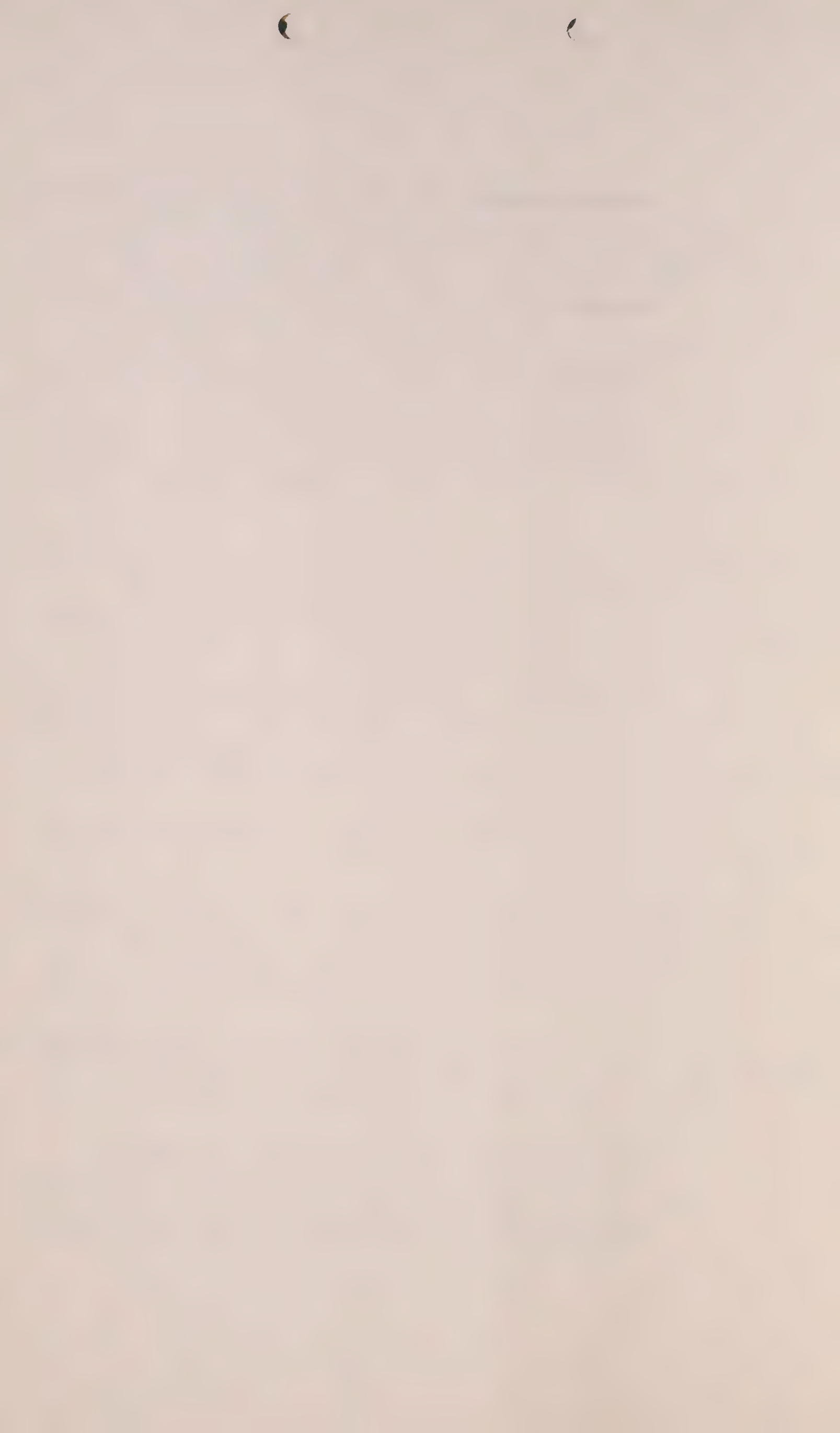
→ ~~Dr~~ Hannah Levin will testify as an expert witness on domestic intelligence and its chilling effect. 1 to 1-1/2 hours.

~~Carole Lipman~~ will testify concerning 1029 Vermont. 1 to 1-1/2 hours.

→ Mark Looney will testify concerning the Rational Observer at American University and the Three Sisters Bridge dispute. 1 to 1-1/2 hours.

~~Shelly Lulkin~~ will testify concerning informants in Washington, D.C., during anti-war demonstrations. 1 to 1-1/2 hrs.

~~Bradford Lytle~~ will testify concerning PCPJ. 45 minutes to 1 hour.



John B. Layton will testify concerning MPD policy and his role in relation to the Intelligence Division. 1 to 1-1/2 hours.

~~Vin McClellan~~ will testify concerning Mayday. 1 to 1-1/2 hours.

~~Father Richard McSorley~~ will testify concerning WPC. 45 mins. to 1 hour.

~~Dorothy McGhee~~ will testify concerning the Three Sisters Bridge dispute. 45 mins. to 1 hour.

John W. Mahaney will testify concerning his activities on the Intelligence Division of MPD. 1 to 1-1/2 hours.

~~JoAnne Malone~~ will testify concerning Waskow and his prison reform project and the Reeses. 1 to 1-1/2 hours.

*~~Charles Marcum~~ will testify concerning his activities as an undercover officer and his illegal entry at 1029 Vermont. 1-1/2 to 2 hours.

*~~Stewart Meachen~~ will testify concerning Steve Wilcox. 1-1/2 to 2 hours.

~~Robert Merritt~~ (Butch) will testify about being an informant for the MPD and the FBI. 1/2 hour to 45 mins.

~~The Rev. Douglas Moore~~ will testify concerning BUF and the headtax. 45 mins. to 1 hour.

*George C. Moore will testify concerning the establishment of Black Nationalist COINTELPRO and New Left COINTELPRO and policies concerning domestic intelligence. 2 to 3 hours.

Philip Mostrom will testify concerning authentication of FBI documents. 45 mins. to 1 hour.

John O'Connor will testify concerning being an undercover officer for the MPD. 1 to 1-1/2 hours.

~~Sheila O'Donnell~~ will testify concerning Waskow. 1 to 2 hours.

Herman C. Oglesby will testify concerning his activities on the Intelligence Division at the MPD. 1 to 1-1/2 hours.



~~Thomas Okeson~~ will testify concerning his activities on the Intelligence Division at MPD. 1 to 1-1/2 hours.

Gerould Pangburn will testify concerning his domestic intelligence and COINTELPRO, in particular the Poor Peoples' Campaign and BUF. 1 to 1-1/2 hours.

~~Cryl Paine~~ will testify concerning being an undercover FBI agent in Miami. 1 to 1-1/2 hours.

*Sid Peck will testify concerning PCPJ and the headtax. 1 to 1-1/2 hours.

~~Channing Phillips~~ will testify concerning the "Justifiable Homicide" controversy. 1 to 1-1/2 hours.

Ruth Pinkson will testify concerning WSP. 45 mins. to 1 hour.

*Richard P. Pollock will testify concerning his political activities in the organizations in which he was active, in particular the Mayday Collective and PCPJ. He will also testify concerning Annie Kolego. 2 to 3 hours.

*Fred Raines will testify concerning the present practices of the Investigative Services of MPD. 1 to 1-1/2 hours.

~~Harlan Randolph~~ will testify concerning the "Justifiable Homicide" controversy. 45 mins. to an hour.

John Rees will testify concerning his activities as an informant for the MPD. 1 to 1-1/2 hours.

~~Louise Rees~~ will testify concerning his activities as an informant for the FBI. 1-1/2 hours.

*Pat Richards will testify concerning NWRO and the headtax, PCPJ, the Rees', and Annie Kolego. 1-1/2 to 2 hours.

Ellen Riger will testify concerning Annie Kolego. 1 to 1/2 hours.

~~Charles W. Robinson~~ will testify concerning his activities on the Intelligence Division of MPD. 1 to 1/2 hours.



~~Len Redberg~~ will testify concerning the activities of Waskow. 47 mins. to 1 hour.

~~George Rodericks~~ will testify concerning the Mayor's Command Center. 1 to 1/2 hours.

~~John Rudder~~ will testify concerning Black United Front, Eaton, and the "no-knock" controversy. 1 to 1-1/2 hours.

Edward C. Rudiger will testify concerning domestic intelligence in COINTELPRO, in particular Bloom and Abbott. 1 to 1-1/2 hours.

~~Margaret Russel~~ will testify concerning WSP. 45 mins. to an hour.

~~David Ryan~~ will testify concerning his activities on the Intelligence Division of MPD. 1 to 1-1/2 hours.

Steve Sachs will testify concerning the Mayor's Command Center, Annie Kolego, and communications at Mayday PCPJ. 1 to 1-1/2 hours.

*Wilfred R. Schlarman will testify concerning domestic intelligence and COINTELPRO activities, in particular supervising S-5. 1 to 1-1/2 hours.

~~Christopher Scrapper~~ will testify concerning his activities on the Intelligence Division of the MPD. 1 to 1-1/2 hours.

Robert L. Shackelford will testify concerning intelligence and COINTELPRO activities, in particular New Left investigations. 1 to 1-1/2 hours.

~~Polly Shackleton~~ will testify concerning the Three Sisters Bridge dispute. 1 to 1-1/2 hours.

Peggy Shaker will testify concerning 1029 Vermont Avenue Anti-war activities in the 1969-71 period and on government spying.

Carl Shoffler will testify concerning his activities on the Intelligence Division of MPD. 1 to 1-1/2 hours.



~~Grady Shutz~~ will testify concerning 1029 Vermont Avenue and anti-war demonstrations (1969-72). 1 to 1-1/2 hours.

~~Jane Silverman~~ will testify concerning New Left organizations in the District of Columbia. 1 to 1-1/2 hours.

~~Betty Smallwood~~ will testify concerning the Washington Peace Center. 1 to 1-1/2 hours.

~~John Smallwood~~ will testify concerning the Washington Peace Center. 1 to 1-1/2 hours.

~~*Edward Spiker~~ will testify concerning his activities on the Intelligence Division of the MPD. 1 to 1-1/2 hours.

~~Syd Stapleton~~ will testify concerning Steve Wilcos. 1 to 1-1/2 hours.

~~*George R. Suter~~ will testify concerning his activities as a supervisor on the Intelligence Division of the MPD. 1 to 1-1/2 hours.

~~Ethel Taylor~~ will testify concerning WSP. 45 mins. to an hour.

~~Dennis E. Tiede~~ will testify concerning his activities on the Intelligence Division of the MPD. 1 to 1-1/2 hours.

~~Robert N. Torres~~ will testify concerning his activities on the Intelligence Division of the MPD. 1 to 1-1/2 hours.

~~Bill Treanor~~ will testify concerning the Three Sisters Bridge Demonstration dispute. 1 to 1-1/2 hours.

~~Kwame Ture~~ (aka Stokely Carmichael) will testify concerning BUF. 1 to 1-1/2 hours.

~~George Vickers~~ will testify concerning PCPJ FOIA. 1 to 1-1/2 hours.

~~Edith Villastrigo~~ will testify concerning WSP. 1 to 1-1/2 hours.

~~Edwin A. Waite, Jr.~~ will testify concerning domestic intelligence and COINTELPRO, in particular Waskow. 1 to 1-1/2 hours.



→ *Robert Wall will testify concerning Domestic Intelligence-Racial Matters and Black Nationalist COINTELPRO, in particular the Black United Front and headtax. He will also testify about the relationship with the MPD. 2 to 3 hours.

→ *Raymond Wannall will testify concerning the NMC and SWP split. 1 to 1-1/2 hours.

→ *Arthur I. Waskow will testify concerning his political activities and the organizations in which he was active, in particular VMC and prison reform project. He will also testify concerning 1029 Vermont and the Rees'. 2 to 3 hours.

~~Roger Whitehead~~ will testify concerning WPC. 1 to 1-1/2 hours.

~~Sherry Whitehead~~ will testify concerning Annie Kolego in Miami. 1 to 1-1/2 hours.

~~Steve Wilcox~~ will testify concerning NMC and informants. 1 to 1-1/2 hours.

~~Dagmar Wilson~~ will testify concerning WSP. 1 to 1-1/2 hours.

Ref. *Jerry V. Wilson will testify concerning MPD policy and his role as chief as MPD in relation to the Intelligence Division. 1 to 1-1/2 hours.

→ *Melvin A. Winkleman will testify concerning his investigation of illegal activities in the MPD. 2 to 3 hours.

~~David Wise~~, author of the American Police State, will testify an expert on domestic intelligence. 1 to 1-1/2 hours.

~~Ron Young~~ will testify concerning NMC and 1029 Vermont. 1 to 1-1/2 hours.

Ref. *Theodore Zanders will testify concerning activities as supervisor on the Intelligence Division of MPD. 1 to 1-1/2 hours.

Ref. *John J. Zelloe will testify concerning his activities on the Intelligence Division of MPD. 1 to 1-1/2 hours.



~~Phelan Zimmerman~~ will testify concerning the Church Committee Report Findings about COINTELPRO. 1 to 1-1/2 hours.

~~Robert L. Zink~~ will testify concerning his activities as a supervisor on Intelligence Division of MPD. 1 to 1-1/2 hours.

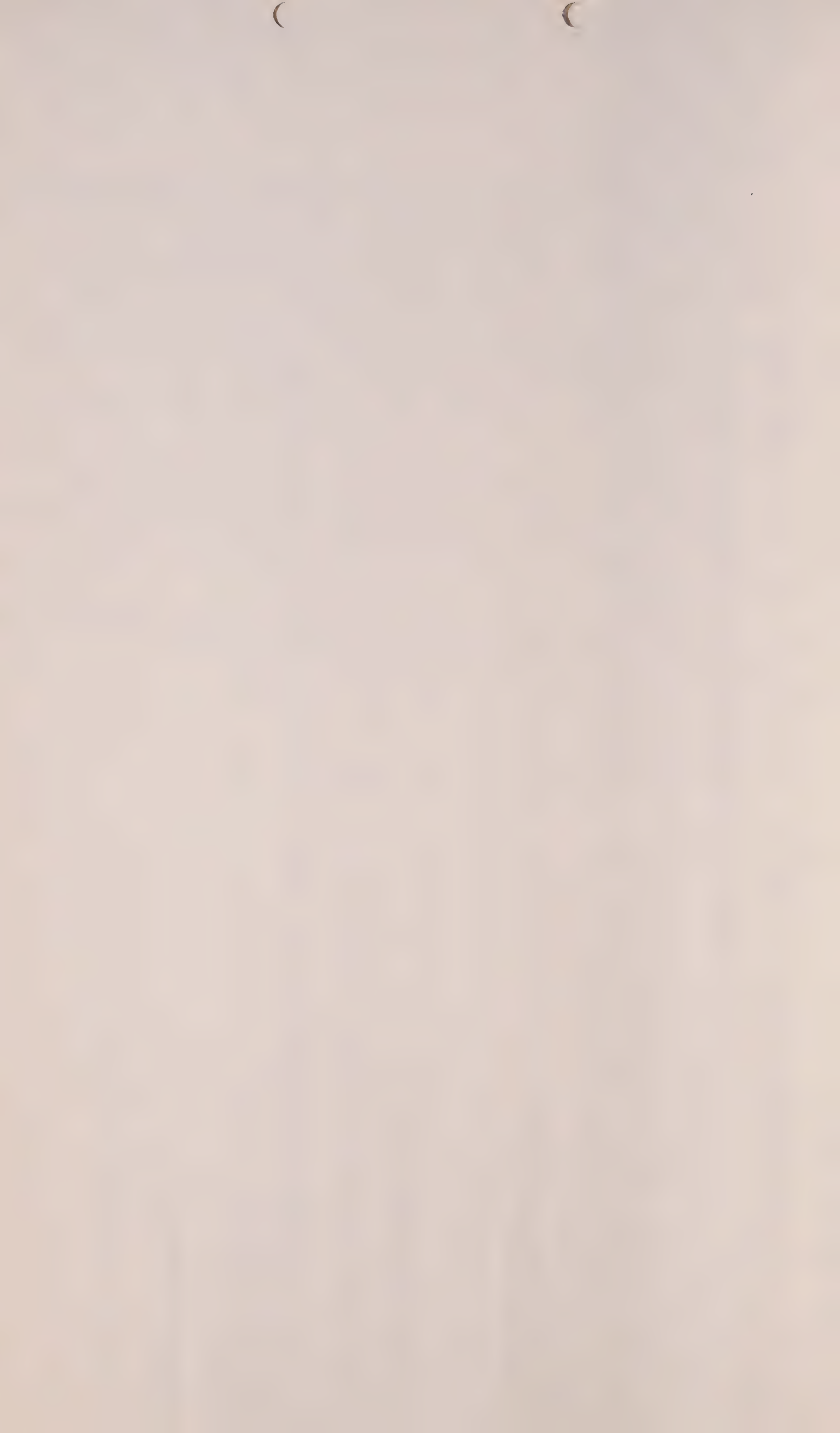
Two unknown media persons will testify about the information given to them by the FBI. 1 to 1-1/2 hours.

*Jane Doe will testify about intimidation by FBI interviews. 45 mins. to 1 hour.

~~William H. Webster~~ or designee will testify concerning present policies and practices of domestic intelligence. 2 to 3 hours.

~~Eric J. Wahl~~ will testify concerning intimidation caused by FBI interviews. 1 to 1 1/2 hours.

~~Sara Weiss~~ will testify concerning WSP and her experiences on the Steering Committee on NMC. 1 to 1 1/2 hours.



2008

II. FACTS TO BE PROVEN

A. Against the FBI Defendants

Plaintiffs propose to prove at trial the following facts against the FBI defendants:

1. During the late 1960's and early 1970's defendants were employed as follows:

a. Defendant Pangburn was a Special Agent of the Washington Field Office (WFO) of the FBI. (Pangburn)

b. Defendant Grimaldi was a Special Agent of the FBI WFO and coordinator of the WFO's participation in the portion of the conspiracy, described below, known as Counterintelligence Program (COINTELPRO) - New Left. (Grimaldi)

c. Defendant Jones was a Special Agent of the FBI WFO holding the position of Security Coordinator; he directed or approved all of the WFO's noncriminal activities and was the supervisor of defendants Grimaldi and Pangburn. (C. Jones)

d. Defendant Moore was Chief of the Racial Intelligence Section of FBI Headquarters' Domestic Intelligence Division; he directed or approved all of the FBI's domestic intelligence and Counterintelligence Program activities pertaining to Black activists, including plaintiffs Booker and Eaton, and coordinated these activities with those directed or approved by defendant Brennan in the latter's capacity as Chief of the Internal Security Section of the Domestic Intelligence Division. (G. Moore)

e. Defendant Brennan was first Chief of the Internal Security Section of the FBI's Domestic Intelligence Division, then FBI Assistant Director in charge of the Domestic Intelligence Division; in the former capacity he directed or approved all

domestic intelligence and Counterintelligence Program activities pertaining to plaintiffs Abbott, Bloom, Hobson, Pollock, Washington Peace Center (WPC), Washington Area Women Strike for Peace (WSP), and Waskow, and coordinated those activities with similar activities directed or approved by defendant Moore; in the latter capacity defendant Brennan directed or approved all domestic intelligence and Counterintelligence Program activities and was the supervisor of defendant Moore. (Brennan)

2. During the late 1960's and early 1970's defendants conspired to disrupt and counteract plaintiffs' exercise of their constitutional rights of free political association and expression and during part of the operation of this conspiracy, formally institutionalized it under the name Counterintelligence Program (COINTELPRO):

a. The targets of the conspiracy were organizations designated by the FBI "Black Nationalist - Hate Groups" or "New Left," other political organizations, and individuals active in the organizations. (Brennan; G. Moore; Jones; Grimaldi; Exhibits A and B, Opposition to Motions by defendants Brennan, Moore, Grimaldi, Pangburn, Jones, and Webster for judgment on the pleadings (hereinafter "Opposition")).

b. WPC, WSP and organizations in which plaintiffs were active or leading members were targets of the conspiracy, and some of these organizations were designated "Black Nationalist - Hate Groups" or "New Left." (Brennan; G. Moore; Jones; Grimaldi; Abbott; Bloom; Waskow; T. Hobson; Eaton; Pollock; Booker; Villistrigo; Kaufman; Lens; Peck; Barry; Exhibits A-HH, Opposition; Exhibits 4-13, attached).

3. In furtherance of the conspiracy defendants committed the following acts:

a. Defendant Moore directed the preparation and release to news media contacts of derogatory information designed to disrupt and counteract Martin Luther King, Jr.'s Poor Peoples'

Campaign, in which plaintiff Eaton was active as a local organizer. (G. Moore; Eaton; Exhibits J, K and L, Opposition)

b. Defendants Grimaldi, Jones and Brennan directed the submission to the Washington Mobilization Committee-affiliate of the New Mobilization Committee (NMC) in which plaintiffs Bloom and Waskow were leading members, and with which Plaintiff Abbott, Pollock, Hobson, Washington Area Women Strike for Peace (WSP) and Washington Peace Center (WPC) were actively affiliated--ficticiously completed forms arranging housing for persons coming to the Mobilization Committee-sponsored demonstrations coinciding with the 1969 inauguration of President Nixon. (Exhibit M, Opposition)

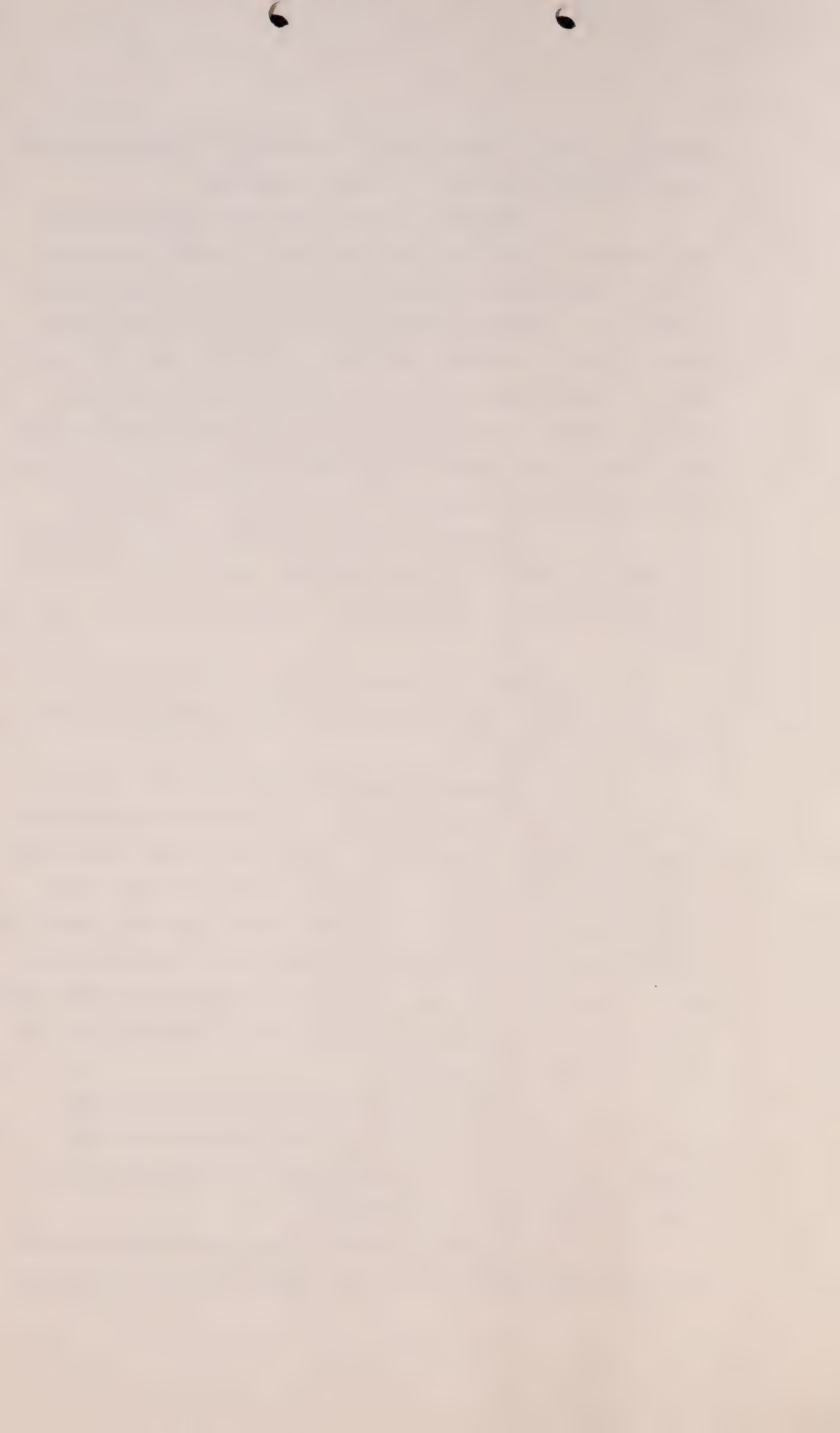
c. Defendants Grimaldi, Jones and Brennan directed disruption of Mobilization Committee radio communications during the 1969 inauguration demonstrations. (Exhibits N, O & P, Opposition)

d. Defendant Brennan directed poison pen letter efforts to ridicule the inauguration demonstrations and the NMC. (Exhibits 1-3, attached)

e. Defendants Grimaldi, Jones, Brennan, and Moore directed FBI informants to instigate, and directed preparation of poison pen letters to exacerbate, division and tension between the Black United Front (BUF), in which plaintiffs Booker and Eaton were leading members, and the New Mobilization Committee (NMC), the national affiliate of the Washington Mobilization Committee, over Mobilization Committee plans to hold an anti-Vietnam War demonstration in Washington November 15, 1969. (Wall; Exhibits Q, HH & S, T, Y, X, Z, and AA, Opposition)

f. Defendant Brennan directed poison pen letter efforts to sow division and tension among members of the NMC Steering Committee, which included plaintiffs Waskow and Bloom. (Wannell; Exhibits FF & GG, Opposition)

g. Defendants Grimaldi, Jones and Brennan directed preparation and distribution on the campus of American University



of a newsletter falsely proclaiming to be the work of students, warning students of harmful future consequences of political activism, opposing the Student Mobilization Committee, with which plaintiffs Pollock and Waskow were affiliated, and urging students to take legal action against the official student newspaper, on which plaintiff Pollock served as a staff member. (Grimaldi; Waskow; Pollock; Exhibits BB, CC, DD & EE)

h. Defendants conducted noncriminal domestic intelligence investigations of plaintiffs, and for those investigations, directed FBI informants to infiltrate plaintiffs WSP, WPC and organizations in which individual plaintiffs were active or leading members, to seek leadership positions in those organizations, to learn, influence, and report to the FBI the organizations' activities, to report the names of leaders, members or associates of the organizations, to report the political ideas expressed and decisions made at private meetings, and to report both the political beliefs and nonpolitical personal activities of plaintiffs. (All FBI defendants; Exhibits 17, 22, attached; Exhibits A-E, II, JJ, KK, LL, MM, NN, OO, PP, & QQ, Opposition)

i. Defendants conducted overbroad domestic intelligence investigations of plaintiffs, urging informants and collecting information over a time period far longer than, and to a degree far in excess of, that which could conceivably have been necessary to accomplish any possible, legitimate governmental purpose. (Excerpts from FBI files of Bloom, Waskow, Hobson, Eaton, Abbott, Pollock, WPC, WSP, and Booker; Exhibit O, Opposition)

j. Defendants included in their domestic intelligence investigations FBI agent interviews, conducted sometimes under false pretenses, of plaintiffs' neighbors and associates in order to inform them of plaintiffs' activities and the FBI's interest in them, to gather personal information concerning plaintiffs, or to deter the neighbors or associates from affiliating with plaintiffs. (Excerpts from plaintiffs' files indicating pretext phone calls; Exhibit 18, attached)

k. Defendants Jones, Moore, and Brennan directed the installation of warrantless wiretaps on telephones of political organizations and overheard private conversations of plaintiffs Eaton, Booker, Pollock, Bloom, Abbott, and Waskow. (Mostrom; Exhibit 14, attached)

1. Defendant Pangburn conducted, and defendants Grimaldi, Jones, Brennan, and Moore directed FBI agents to conduct, interviews of persons manifesting interest in organizations in which plaintiffs were active, in order to intimidate those persons, deter them from becoming more active, or recruit them as FBI informants. (Pangburn; Schlarman; Aldhizer; D. Moore; Wahl; Exhibits 15-17, attached)

m. Defendants Grimaldi, Jones, and Brennan received, or approved the FBI's receipt of, stock certificates and letters belonging to an organization in which plaintiffs were active or leading members, or with which plaintiffs were affiliated, knowing the certificates and letters were stolen by a Metropolitan Police Department (MPD) undercover officer or informant. (Marcum; Suter; documents not yet produced by D.C. defendants)

n. Defendants Jones, Moore, and Brennan maintained the names of plaintiffs Abbott, Bloom, Eaton, Pollock, and Waskow on a list of persons to be summarily arrested and detained without charge in the event of a proclaimed national emergency. (Defendants' response to plaintiffs' first set of interrogatories; Exhibits 26-29, attached)

4. Defendants knew the D.C. defendants were involved in similar efforts to disrupt and counteract plaintiffs' exercise of their constitutional rights; defendants shared with the D.C. defendants information concerning their similar efforts and acted in concert with them. (Pangburn; Grimaldi; Jones; Suter; Marcum; Wall; J. Rees; L. Rees; Exhibits 20-25, attached)

B. Against the D.C. Defendants

Plaintiffs propose to prove at trial the following facts



against the D.C. defendants:

1. During the late 1960's and early 1970's defendants were employed as follows:

a. Defendants Gildon, Jagen, Bynum, Mahaney, Day, and James Binsted were Metropolitan Police Department (MPD) officers assigned to the Intelligence Division. (Gildon; Jagen; Bynum; Mahaney; Day; J. Binsted)

b. Defendant Shoffler was a MPD officer who supervised MPD informants who investigated, disrupted, and counteracted plaintiffs' exercise of constitutional rights. (Shoffler)

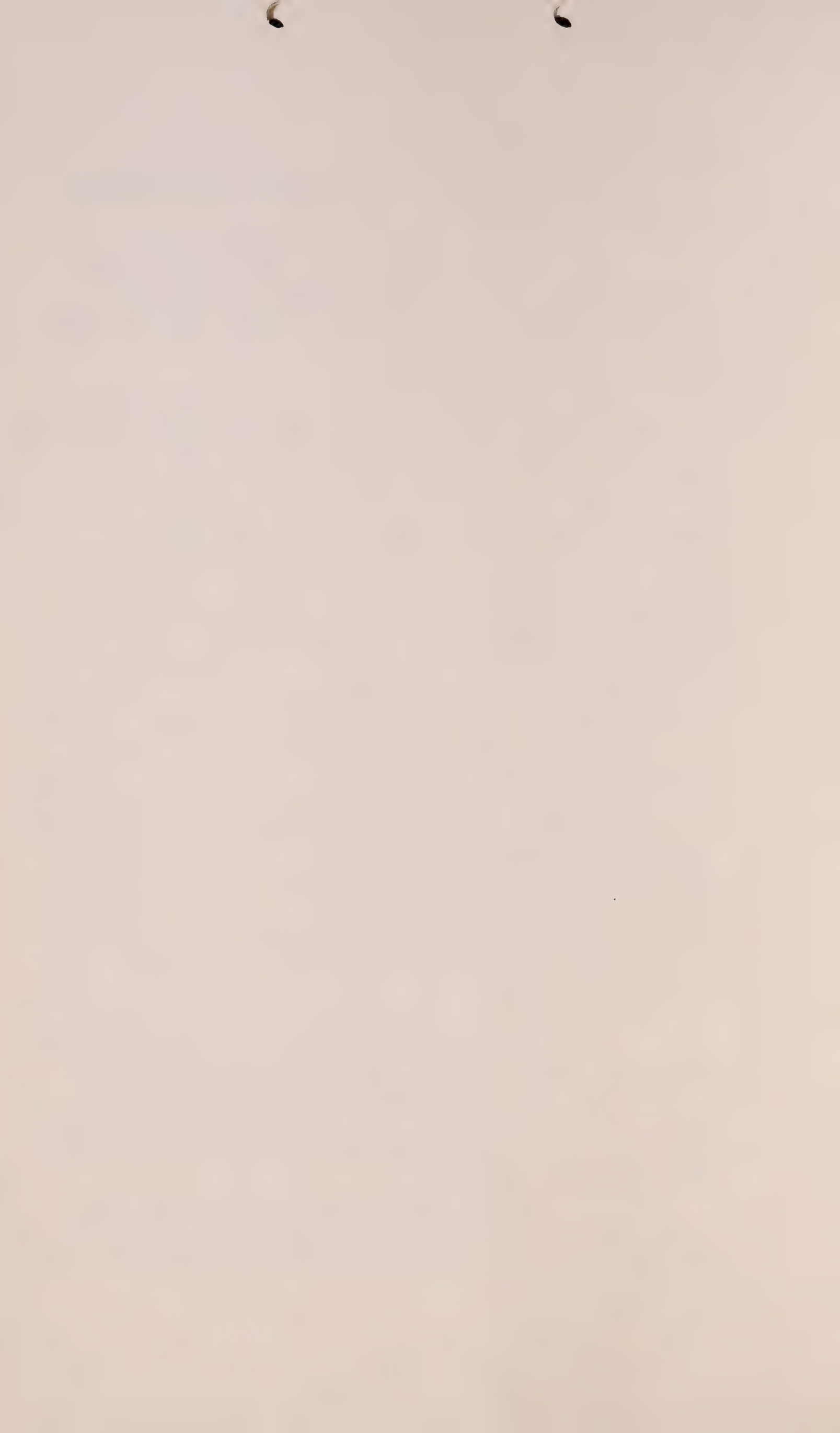
c. Defendants Dorie Binsted and Markovich were MPD Intelligence Division informants. (D. Binsted; Gildon)

d. Defendant Scrapper was a sergeant in the MPD assigned to the Intelligence Division who supervised defendants Gildon, Jagen, Bynum, Mahaney, Day, James Binsted, Dorie Binsted, and Markovich, and directed or approved their activities and those of other Intelligence Division officers and informants. (Scrapper)

e. Defendant Acree was first a sergeant and later a lieutenant in the MPD assigned to the Intelligence Division; as a sergeant he collaborated with, and had authority and responsibility equal to that of defendant Scrapper; as a lieutenant defendant Acree retained this authority and responsibility and assumed authority and responsibility to direct or approve the activities of all sergeants in the Intelligence Division, and their subordinates. (Acree)

f. Defendant Suter was first a lieutenant and later a captain in the MPD assigned to the Intelligence Division; he supervised all Intelligence Division informants and officers, other than the director of the Division, and directed or approved their activities. (Suter)

g. Defendants Herlihy, Ferguson, and Zink were, successively, directors of the Intelligence Division of the MPD,



holding the rank of Inspector; they supervised all Intelligence Division informants and officers and directed or approved their activities. (Herlihy; Ferguson; Zink)

h. Defendant Zanders was Assistant Chief of Police; he supervised defendant Shoffler and all officers and informants of the Intelligence Division, and directed or approved their activities. (Zanders)

i. Defendants Layton and Wilson were, successively, MPD Chief of Police; they supervised all MPD officers and informants and directed or approved their activities. (Layton; Wilson)

2. During the late 1960's and early 1970's defendants conspired to disrupt and counteract plaintiffs' exercise of their constitutional rights of free political association and expression. (Exhibits 1, 2 deposition of Kirwin; Documents yet to be produced by D.C. defendants; Winkleman; Campbell)

3. In furtherance of the conspiracy defendants committed the following acts:

a. Defendants conducted or directed noncriminal, intelligence investigations of plaintiffs, and for those investigations, directed police undercover officers or informants to infiltrate plaintiffs WSP, WPC, and organizations in which individual plaintiffs were active or leading members, to seek leadership positions in those organizations, to learn, influence, and report to the Metropolitan Police Department (MPD) the organizations' activities, to report the names of leaders, members, or associates of the organization, to report the political ideas expressed and decisions made at private meetings, and to report both the political beliefs and nonpolitical personal activities of plaintiffs. (Exhibits 1, 2, deposition of Kirwin; Exhibits 1, 2, 3, deposition of Suter; Ferguson; Drummond; Kirwin; Documents yet to be produced by D.C. Defendants; Winkleman)

(1) Defendant Jagen, an undercover officer, infiltrated organizations with which plaintiffs WPC, Bloom, Abbott, Hobson and Waskow were affiliated, and committed the acts stated above. (Jagen; Bloom; Abbott)

(2) Defendant Bynum, an undercover officer, infiltrated organizations in which plaintiffs Booker and Abbott were active and committed the acts stated above. (Bynum; Booker; Abbott; Bloom)

(3) Defendant Dorie Binsted, an informant, infiltrated organizations in which plaintiff Hobson was active and committed the acts stated above. (D. Binsted; Hobson)

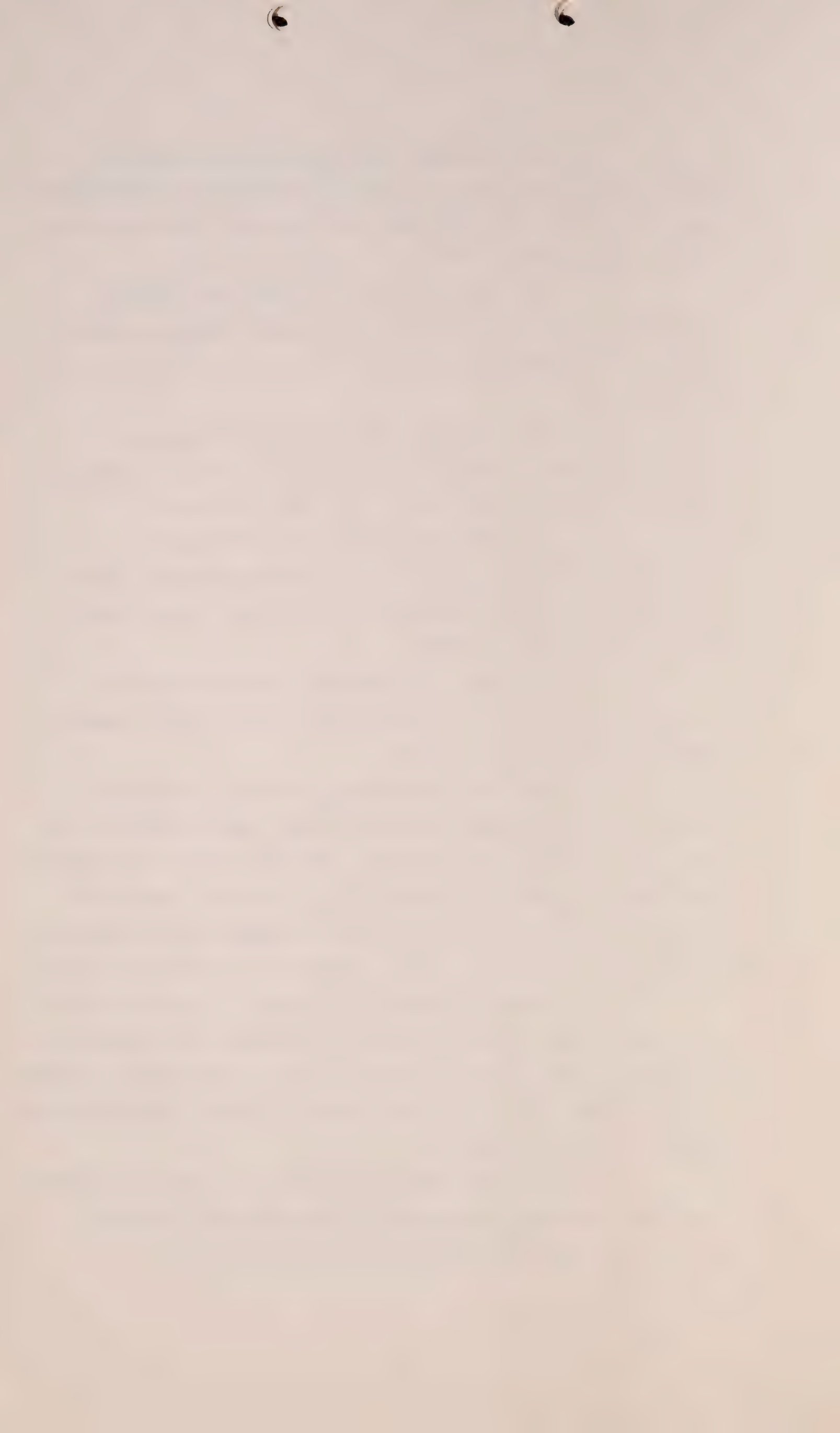
(4) Defendant Markovich, an informant, infiltrated organizations in which plaintiff Pollock was active and committed the acts stated above. (Pollock; Cullum; Albert; Banks; Gildon; Suter; Scrapper)

(5) The other defendants also conducted or directed investigations of plaintiffs as stated above. (Gildon; Mahaney; Day; Shoffler; Scrapper)

b. Defendants conducted overbroad, noncriminal, intelligence investigations of plaintiffs, using informants and undercover officers and collecting information over a time period far longer than, and to a degree far in excess of, that which could conceivably have been necessary to accomplish any possible, legitimate governmental purpose. (Sources cited under a., supra.)

c. Defendant Markovich on several occasions acted as agent provocateur, urging persons to be violent at demonstrations organized or supported by plaintiffs, and on one occasion throwing a tear gas canister at uniformed police. (Pollock; Cullum; Albert; Banks; R. Davis; Drobinnaire)

d. Defendants who were Markovich's superiors directed her to act as agent provocateur, or approved her so acting. (J. Binsted; Abbott; Cullum; Banks; Albert; Francis)



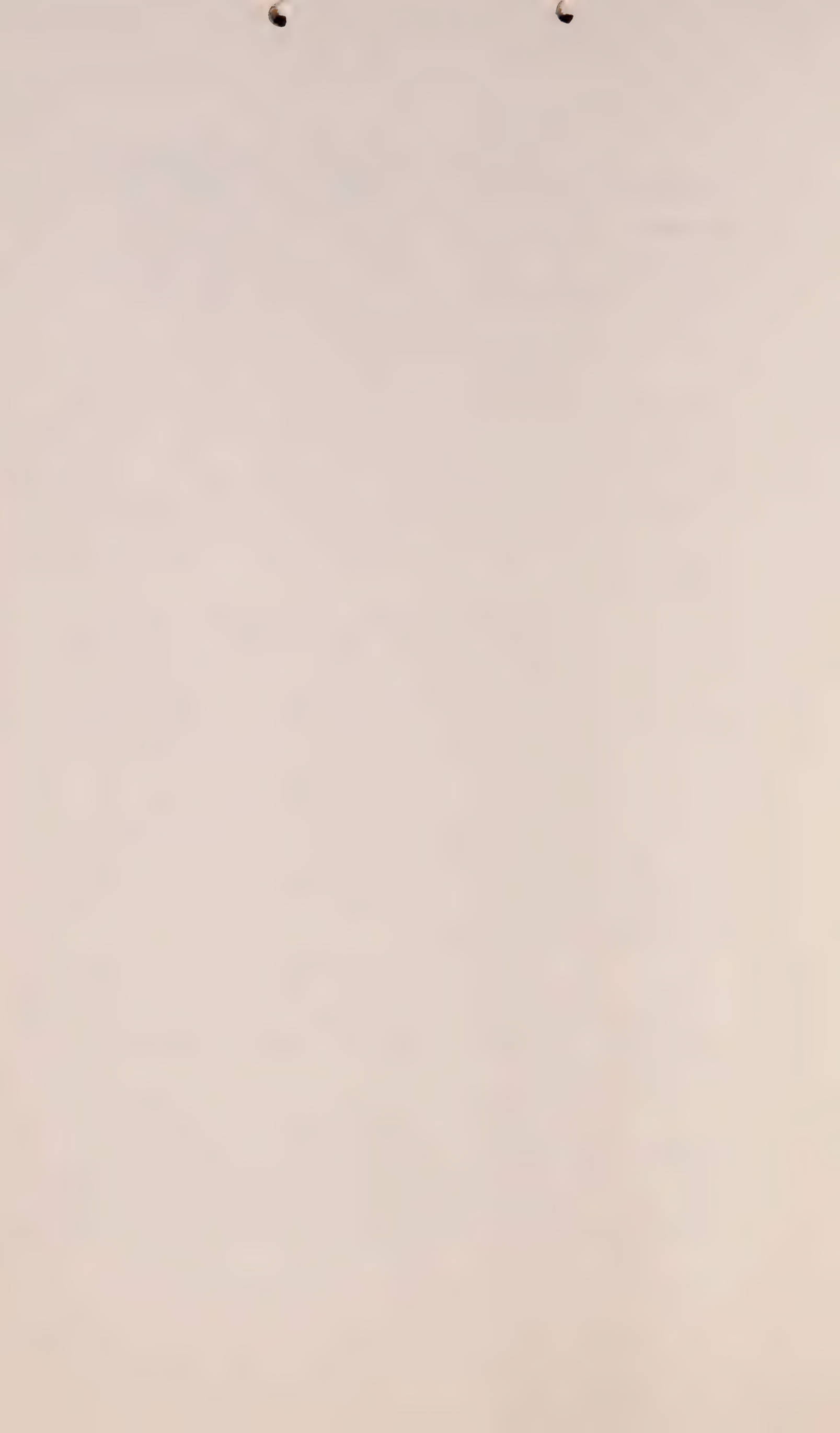
e. Defendants directed undercover officers or informants to urge persons to confront police violently at a November 6, 1969 demonstration organized or supported by plaintiffs to protest construction of the proposed Three Sisters' Bridge, or defendants approved the undercover officers' or informants' so acting. (Abbott; Francis; J. Binsted)

f. Defendants directed undercover officers or informants to damage photocopying equipment in offices at 1029 Vermont Avenue, N.W., occupied by organizations in which plaintiffs were active or leading members, or with which they were affiliated; or defendants approved the undercover officers' or informants' so acting. (Spiker; Winkleman; Documents yet to be produced by D.C. defendants)

g. Defendants Scrapper, Acree, Suter, and their defendant superiors directed an undercover officer and informant to enter unlawfully a 1029 Vermont Avenue, N.W., office of an organization in which plaintiffs were active or leading members, or with which they were affiliated, and to remove unlawfully from a locked desk a metal box containing stock certificates and letters belonging to an organization; or those defendants and their superiors approved the undercover officers' and informants' so acting. (Marcum; Suter; Winkleman; Campbell; Documents yet to be produced by D.C. defendants)

h. Defendants Scrapper, Acree, Suter, and their defendant superiors directed or approved the delivery of the stock certificates and letters to defendant Grimaldi. (Marcum; Winkleman; Campbell)

i. Defendants Scrapper, Acree, Suter, and their defendant superiors directed or approved the installation of electronic listening devices in informants' homes and directed, approved, or participated in the electronic monitoring of meetings



held in those homes by organizations in which plaintiffs were active or leading members. (Marcum; Winkleman; Zelloe; Suter; Campbell; Documents yet to be produced by D.C. defendants; Exhibit 30, attached)

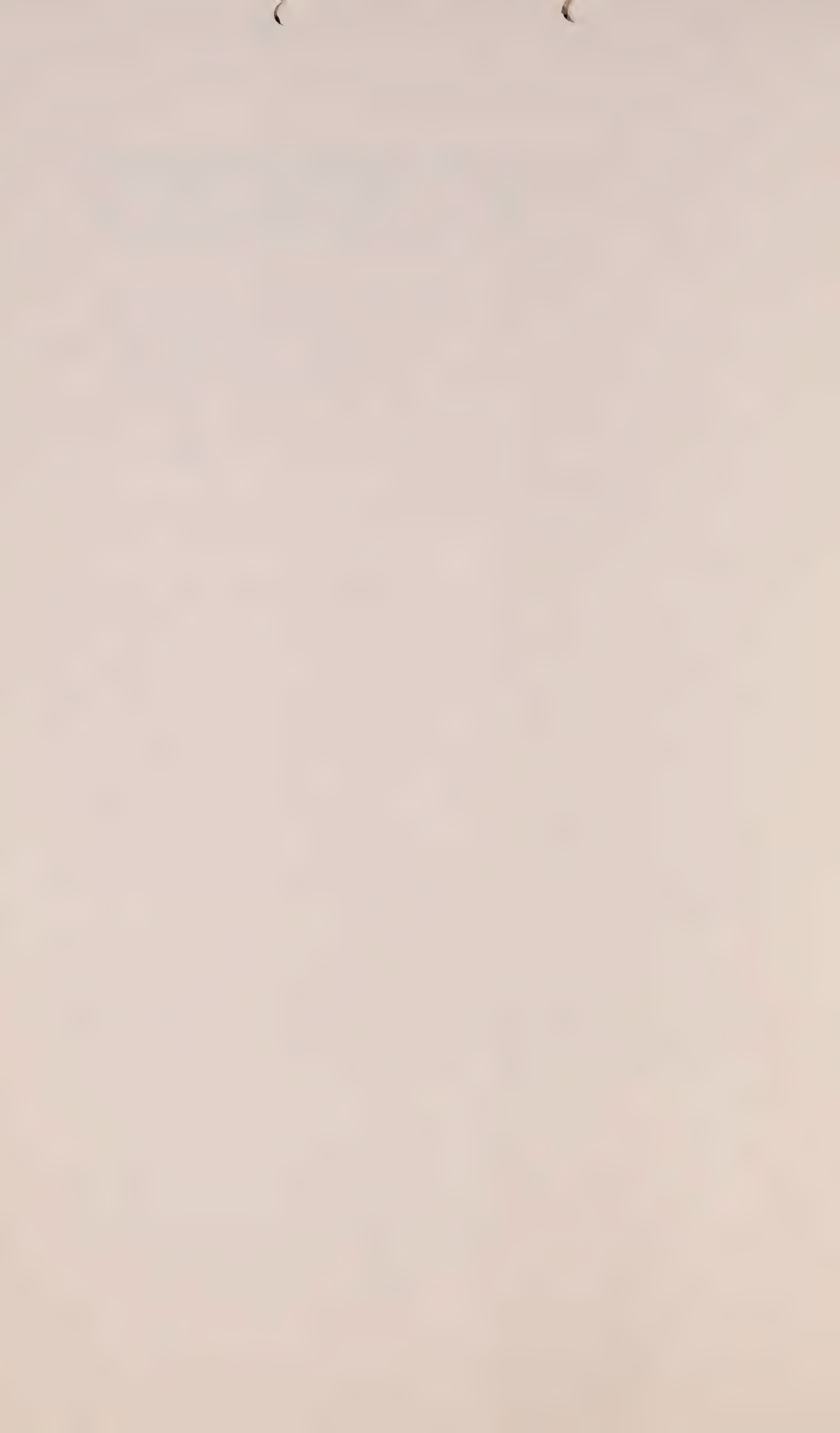
4. Defendants knew the FBI defendants were involved in similar efforts to disrupt and counteract plaintiffs' exercise of their constitutional rights; defendants shared with the FBI defendants information concerning their similar efforts and acted in concert with them. (Sources cited under A.4, supra.)

C. Against All Defendants

Plaintiffs propose to prove at trial the following facts against all defendants:

1. As a result of defendants' investigation, disruption, and counteraction of plaintiffs' exercise of constitutional rights plaintiffs were hindered and delayed in the accomplishment of their political goals, precluded from associating with those deterred by defendants from engaging in political activity, required to spend time and effort overcoming defendants' disruption and counteraction, and denied unfettered enjoyment of their constitutional liberties. (Report, White House Conference on Youth (1970); Doe; Donner; Borosage; Gurewitz; Bloom; Waskow; Hobson; Eaton; Abbott; Pollock; Kaufman; Villistrigo; Booker)

2. As a result of defendants' investigation, disruption, and counteraction of plaintiffs' exercise of constitutional rights plaintiffs suffered stress and other mental and emotional harm. (Levin; Bloom; Waskow; Hobson; Eaton; Abbott; Pollock; Booker)



III. Legal Contentions

A. A conspiracy by police or federal agents to disrupt or counteract persons' exercise of first amendment rights is actionable directly under the Constitution. (Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)*; Dellums v. Powell, 184 U.S.App. D.C. 275, 566 F.2d 167 (1977)).

B. A nationwide conspiracy by federal agents to disrupt or counteract exercise of first amendment rights by a class of persons selected by the federal agents according to political belief or a similar conspiracy by District of Columbia officials formulated or implemented in part in a state or territory, is actionable under 42 U.S.C. §1985(3). (Griffin v. Breckenridge, 403 U.S. 88 (1971)*; Founding Church of Scientology v. Director, Federal Bureau of Investigation, 459 F.Supp. 748 (D.D.C. 1978); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975)).

C. Defendants' conspiracies against plaintiffs are actionable under the Constitution and 42 U.S.C. §1985(3).

D. Defendants' acts to disrupt or counteract plaintiffs' exercise of first amendment rights violated the first amendment and are actionable. (Dellums*, supra; Jabara v. Kelley, 476 F. Supp. 561 (E.D. Mich. 1979); Founding Church of Scientology v. Director, Federal Bureau of Investigation, 459 F.Supp. 748 (D.D.C. 1978); Socialist Workers Party v. Attorney General, 463 F.Supp. 515 (S.D.N.Y. 1978); Alliance to End Repression v. Rockford, 407 F.Supp. 115 (N.D. Ill. 1975); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976); Handschu v. Special Services Division, 349 F.Supp. 766 (S.D.N.Y. 1972)).

E. Police or FBI use of infiltrators or informants to gather information on first amendment activities for the purpose of generating plans to disrupt or counteract those activities violates the first amendment and is actionable. (Buckley v. Valeo, 424 U.S. (1976); United States v. O'Brien, 391 U.S. 367, (1968)*; NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361



U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958)*; Jabara*, supra; Alliance to End Repression*, supra).

F. Where a substantial motive for police or FBI use of infiltrators or informants is the gathering of information to disrupt or counteract first amendment activities, an action against the police or FBI will lie unless the defendants prove by a preponderance of the evidence that the use of infiltrators or informants was also justified by a substantial, legitimate governmental interest, that the duration, intensity, and scope of the investigation was reasonably necessary to accomplish that legitimate purpose, and that the defendants, in fact, would have conducted an investigation of that duration, intensity, and scope, even in the absence of the illicit motive. (Mount Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977); also, sources cited under E, supra).

G. Defendants' gathering of private political information concerning groups in which plaintiffs were active and the participation of undercover agents and informants in decision-making by those groups invaded plaintiffs' associational privacy and was justified only if the government interest served thereby was substantial and unrelated to suppression of free expression or association and if the government intrusion was no greater than that essential to furtherance of the legitimate government interest. (Buckley, supra; O'Brien*, supra; NAACP v. Button, supra; Bates, supra; NAACP v. Alabama, supra*; Jones v. Unknown Agents of the FEC, 613 F.2d 864 (D.C. Cir. 1979)).

H. Defendants' gathering of private information concerning political groups in which plaintiffs were active, and use of infiltrators that participated in group decision-making, is actionable not only because it was overbroad, but also because it served no substantial legitimate governmental purpose.

I. Defendants' gathering of information concerning plaintiffs' personal political beliefs and personal, nonpolitical activities invaded plaintiffs' constitutional right to privacy and is actionable. (Bivens, supra; Whalen v. Roe, 429 U.S. 589 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965)*; Jones, supra*).



J. Defendants' placement of plaintiffs' names on a list of persons to be arrested and detained without charge in the event of a proclaimed emergency, without notice and opportunity to oppose their listing, violated plaintiffs' constitutional right of due process and is actionable. (Goss v. Lopez, 419 U.S. 565 (1975)).

K. Plaintiffs are entitled to compensatory damages for defendants' violation of plaintiffs' constitutional rights. (Carey v. Piphus, 435 U.S. 247 (1978); Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979); Tatum v. Morton, 562 F.2d 1279 (D.C. Cir. 1977)*).

L. Plaintiffs are entitled to compensatory damages for stress and other mental and emotional harm suffered. (Smith v. Anchor Bldg., Corp., 536 F.2d 231 (8th Cir. 1976)*; Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1974)).

M. Plaintiffs are entitled to punitive damages. (Paton v. LaPrade, 524 F.2d 862 (3rd Cir. 1975)*; Nader v. Allegheny Airlines, Inc., 512 F.2d 527 (D.C. Cir. 1975)).



IV. Argument

A. The FBI Case

Major aspects of plaintiffs' case against the FBI defendants were set forth in plaintiffs' opposition to those defendants' motion for judgment on the pleadings. Those aspects are presented in more summary fashion below, along with additional parts of the case.

The findings of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee),^{1/} and COINTELPRO documents obtained through plaintiffs' research and discovery,^{2/} establish defendants' participation in a conspiracy to disrupt and counteract plaintiffs' constitutionally-protected political activities.

A conspiracy of this kind is tortious under common law. W.L. Prosser, Law of Torts §46 (4th Ed. 1971). Torts committed by government agents against persons' exercise of first amendment rights are constitutional torts actionable for damages. Bivens, supra; Dellums, supra; Tatum v. Morton, supra. Defendants' conspiracy, therefore, is an actionable constitutional tort.

Defendants' conspiracy was nationwide in scope. Since it extended to the states as well as the District of Columbia, it is actionable under 42 U.S.C. §1985(3), as well as directly under the constitution. Founding Church of Scientology v. Director, Federal Bureau of Investigation, supra.

In furtherance of the conspiracy, defendants (1) disseminated derogatory information to counteract plaintiff Eaton's work on the Poor Peoples' Campaign; (2) disrupted logistical arrangements and communications at a demonstration organized or supported by plaintiffs and held January 20, 1969; (3) disseminated derogatory

^{1/} Intelligence Activities and the Rights of Americans, Final Report, Book II, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S.Rep.No. 755, 94th Cong., 2d Sess. (1976). Exhibit D to plaintiffs' opposition to defendants' motion for judgment on the pleadings.

^{2/} Exhibits A-C, E-HH to plaintiffs' opposition plus Exhibits 1-13 attached to this brief.



information ridiculing the demonstration; (4) directed informants to instigate, and used fictitious mailings to exacerbate, tensions between black and white activists, including plaintiffs, regarding plans for an anti-Vietnam War demonstration held November 15, 1969; (5) published and disseminated at American University a fictitious newsletter using redbaiting tactics, warning students not to join plaintiffs' causes; and urging students to take legal action against the official student newspaper, for which plaintiff Pollock worked; (6) published and disseminated fictitious memoranda and leaflets to divide the Steering Committee of the New Mobilization Committee to End the War in Vietnam, on which plaintiffs Bloom and Waskow were members; and (7) conducted--with intensity, scope, and duration far in excess of that conceivably necessary for any legitimate governmental purpose, and, in fact, for an illegitimate purpose--noncriminal domestic intelligence investigations of plaintiffs, for which defendants directed FBI informants (a) to infiltrate plaintiffs WSP, WPC, and organizations in which individual plaintiffs were active or leading members; (b) to seek leadership positions in those organizations in order to learn, influence, and report to the FBI the organizations' activities; (c) to report the names of leaders, members, or associates of the organizations; (d) to report the political ideas expressed and decisions made at private meetings; and (e) to report both the political beliefs and nonpolitical personal activities of plaintiffs.

The first six activities listed above were clearly tortious. No cases hold such FBI conduct proper and many condemn it. Jabara, supra; Socialist Workers Party, supra; Alliance to End Repression, supra; Berlin Democratic Club, supra; Handschu, supra.

The seventh FBI activity listed above, overbroad noncriminal domestic intelligence investigation, was also tortious. Although use of informants to gather political information either publicly available, or normally available to an investigating newspaper reporter, will not support a claim for relief, Laird v. Tatum, 408 U.S. 1 (1972), the informants in this case invaded associational

privacy by attending private meetings, filching membership lists, and participating in the decision-making of political organizations. Buckley, supra; Bates, supra; NAACP v. Alabama, supra.

The right of associational privacy is not absolute, and such activities, despite their privacy-invading effects, might be outweighed if police had reliable information creating reasonable suspicion that a group was engaged in organized criminal activity and that infiltration of the group for a limited time was necessary to confirm or reject the suspicion and, if confirmed, to investigate and prosecute criminal violations. These circumstances would meet the O'Brien test for permissible government action having an incidental effect on first amendment rights:

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, supra at 377. (Emphasis added, footnotes omitted.)

The noncriminal domestic intelligence investigations conducted by the FBI defendants fail all elements of this test. First, the purpose of the investigations was to gather information to use in counteracting and disrupting free expression. Exhibits A-D.

Second, even if there were other purposes, and assuming arguendo their legitimacy, the illegitimate purpose was a substantial motivating factor. Defendants, therefore, bear the burden of proving by a preponderance of the evidence (a) that legitimate purposes reasonably justified investigations having the same intensity, scope, and duration as those actually conducted, and (b) that defendants, in fact, would have conducted such investigation



in the absence of the illicit motive. Mount Healthy City Board of Ed., supra.

The evidence does not support finding (a); furthermore, plaintiffs and others remain active in promoting the same causes they promoted in the late 1960's and early 1970's, or causes similar to those efforts, yet the FBI claims to have reduced its surveillance. This is strong evidence that, absent illicit motives, FBI surveillance of plaintiffs would have been substantially reduced from what actually occurred.

Third, the investigations of plaintiffs were overbroad in their intensity, scope, and duration. Excessive numbers of informants were used. Personal information was gathered. Investigation continued years after plaintiffs' nonviolent nature was established. Exhibits II-QQ.

Thus, the FBI's surveillance of plaintiffs, as well as other specific acts to disrupt or counteract their first amendment activities, are actionable, for both compensatory and punitive damages. Dellums, supra; Tatum v. Morton, supra; Paton, supra; Nader, supra; Jabara, supra. The compensatory damages recoverable include those for stress and other mental and emotional harm. Smith, supra; Seaton, supra.

B. The D.C. Case

Plaintiffs' case against the D.C. defendants is also firmly established by documents, available direct testimony, and facts the D.C. defendants should be required to admit for failure to comply with discovery requests.

To prove a tortious conspiracy, it is enough to show knowing tacit cooperation in the pursuit of illicit ends. Hoffman-LaRoche, Inc. v. Greenberg, 477 F.2d 872 (7th Cir. 1971); Dickerson v. U.S. Steel Corp., 439 F.Supp. 55 (E.D. Pa. 1977); U.S. v. Varelli, 407 F.2d 735 (7th Cir. 1969); U.S. v. Zuideveld, 316 F.2d 873 (7th Cir. 1963). The documents defendants have been ordered to produce from a police internal investigation of abuses by the MPD Intelligence Division will establish this point, as excerpts from them already

produced do so. Defendants combined to steal and destroy property of organizations in which plaintiffs were active or leading members. Defendants, moreover, used infiltrators to provoke violence at demonstrations, as plaintiffs will prove through direct testimony.

The overbreadth and privacy-invading nature of defendants' intelligence investigations is amply demonstrated by defendants' own investigation and report (the Cullinane Report) prepared for the Mayor and District of Columbia Council. Exhibits 1 and 2 to the deposition of Garrett T. Kirwin. The breadth of the official standards under which these investigations were conducted also confirms this point. Exhibits 1-3 to the deposition of defendant Suter.

The Cullinane Report also indicates that MPD Intelligence Division files were destroyed because of their overbreadth. Plaintiffs, moreover, have repeatedly sought the identity of a high ranking MPD official having a specific title held by less than six persons, who publicly stated the files were destroyed because the information in them was illegally gathered. Defendants have failed to produce the names and current addresses of the officials who held that title and should be required to admit that a high ranking official would so testify if called.

The evidence against the D.C. defendants fully warrants relief similar to that appropriate against the FBI defendants. Furthermore, the evidence of the FBI and D.C. defendants' mutual cooperation warrants holding them liable as joint tortfeasors for all damages incurred.

Respectfully submitted,

Anne Pilsbury

Anne Pilsbury
17 Danforth Street
Norway, Maine 02468
(207) 925-1144

J. E. McNeil

J. E. McNeil



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action No. 76-1326
)	
JERRY WILSON, <u>et al.</u> ,)	
)	
Defendants.)	

APPENDIX

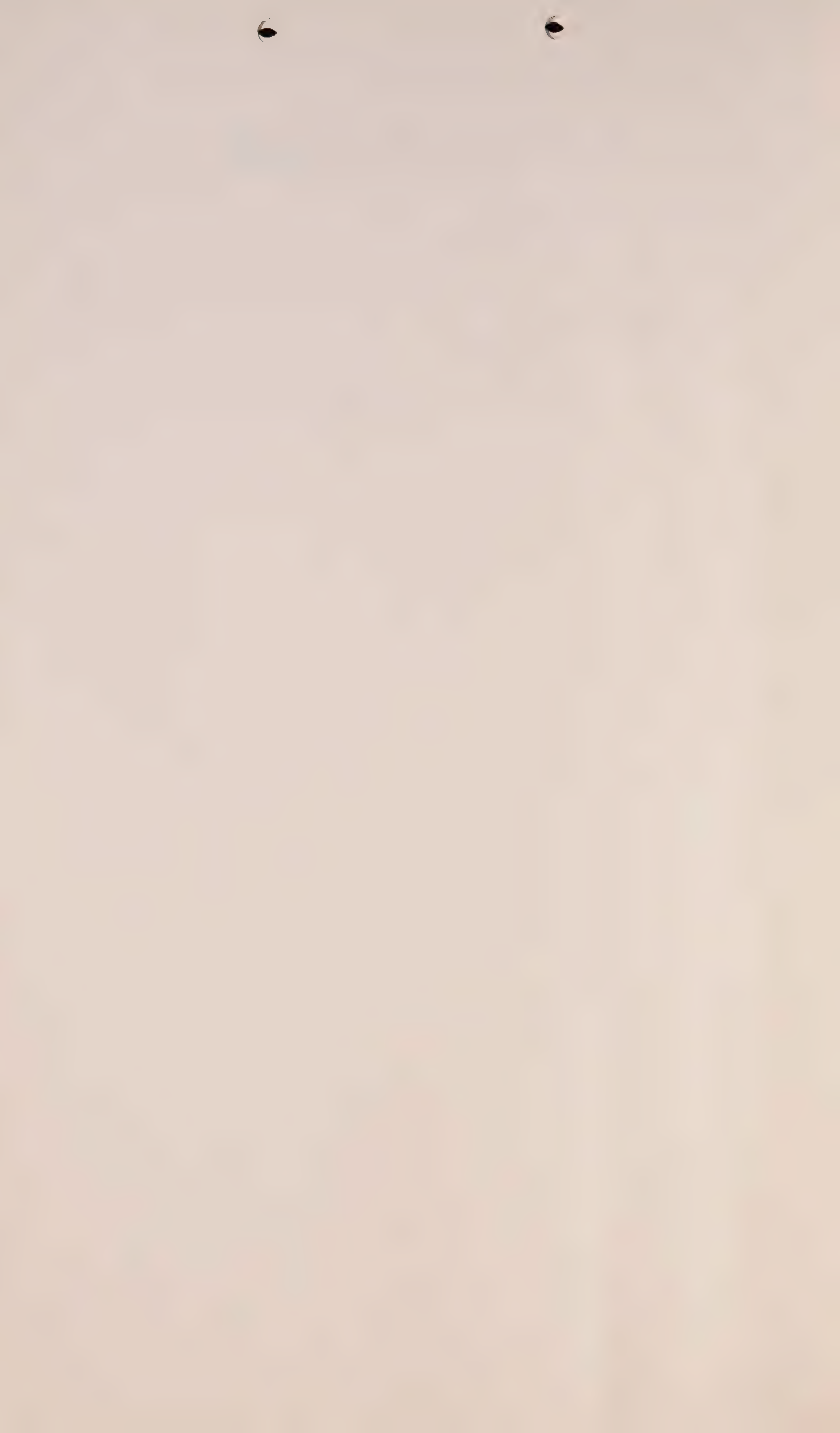


TABLE OF CONTENTS

APPENDIX

- A. Plaintiffs' Proposed Voir dire Examination Questions
- B. Plaintiffs' Preliminary Proposed Jury Instructions
- C. Plaintiffs' Proposed Special Verdict Form
- D. Text of §1985(3)

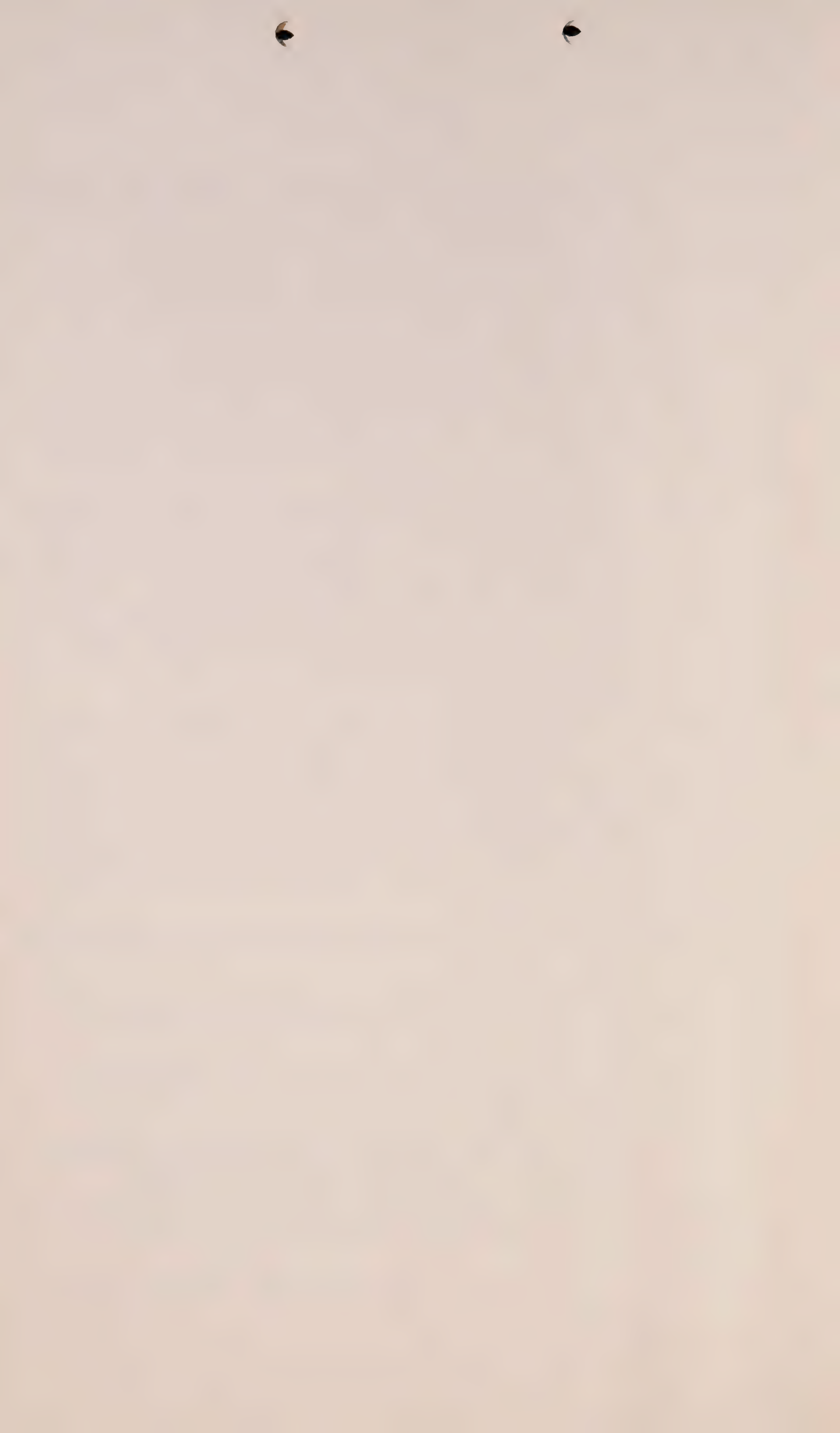
A. Plaintiffs' Proposed Voir Dire Questions

1. Is there anyone on the jury panel who knows any of the counsel for the plaintiff: Dan Schember, Ann Pilsbury, or J.E. McNeil?
2. Is there anyone on the jury panel who knows or who has ever been introduced to counsel for the federal defendants: David White?
3. Is there anyone on the jury panel who knows or has ever been introduced to counsel for the D.C. defendants: Laura Bonn or George Barclay?
4. I will read the names of the plaintiffs in the case and then I will ask any member of the panel who knows any one of them to please so indicate.
5. I will read the names of the defendants and then I will ask any member of the panel who knows any one of them to please so indicate.
6. Do you have any doubt about your ability to render a fair verdict according to the laws instructed by the Court, although you have met _____?
7. Is there any member of the jury panel who is now or was formerly employed by the District of Columbia, or who has some member of their immediate family employed or formerly by the District of Columbia?
8. Is there any member of the panel who is now or was formerly or has some member of their family now or formerly employed for any law enforcement or security agency, either public or private?
9. Does any member of the panel or any member of your immediate family work for the Department of Justice or any other federal agency?

10. The evidence in this case is likely to indicate a conflict between the testimony of certain police officers and FBI agents and certain other persons. Is there anyone on the jury panel who feels that police officers and FBI agents, because of their position, are any more likely to be telling the truth than persons who are not police officers or FBI agents?
11. Has anyone on the jury panel or any member of your immediate family had any personal experience in which you have suffered any personal injury or any property damage in connection with any demonstrations or civil disorders or riots of any kind at any time?
12. Is there anyone on the jury panel who has any feelings that people who protest against the government are unpatriotic?
13. Do you feel that no matter how strongly you feel about something, you should never join a protest group?
14. Do you feel that people who participate in political demonstrations shouldn't be doing it?
15. Would the size of the amount of an award which might be awarded affect your ability to judge the issues fairly and impartially?
16. Do you feel that persons who are critical of the government are less likely to be telling the truth than persons who are not critical?
17. Is it illegal to belong to the Communist Party?
18. Do you feel that anyone who has been linked to the Communist Party is suspect?
19. Do you think a person should have the right to believe and publicly state that the government should be changed?
20. Do you think that a person should have the right to believe

and publicly state that the government should be changed by any means necessary, including popular uprising?

21. Do you think that the government should have the right to penalize a person for believing or publicly stating that the government should be changed?
22. Do you think the government should have the right to penalize a person for believing or publicly stating that the government should be changed by any means necessary, including popular uprising?
23. Do you think that people should have the right to peaceably assemble and march in the streets to express their opinions?
24. Do you think that people should have the right to peaceably assemble and march in the streets to express their opinions even if they know that others may come to disrupt and engage in violence?
25. Do you think that the government should penalize people who peaceably assemble and march to express their opinions?
26. Do you think that the government should penalize people who peaceably assemble and march to express their opinions if those people know that others may come to disrupt and to engage in violence?
27. Did you think that the U.S. military action in Vietnam was proper?
28. What did you think about our military's activities in Vietnam?
29. Is it possible for the FBI or the police department to provoke a crime?
30. Do you think that the civil rights movement was necessary for blacks to improve their position in society?
31. What comes to mind when you hear about the civil rights movement?
32. Have you heard of Stokely Carmichael? What do you think of him?



10

B. Plaintiffs' Preliminary Proposed Jury Instructions

PLAINTIFFS' JURY INSTRUCTION NO. 1 (Introductory Instruction)

Plaintiffs in this case seek money damages from the defendants for violation of their civil and constitutional rights. I shall first explain to you the elements of each of these claimed violations, and then I shall instruct you on the law relating to damages.

Plaintiffs have made several different claims against the various defendants, and it is not necessary to plaintiffs' recovery for you to find that all of plaintiffs' claims have been proved. If you should find that one, some, or all of plaintiffs' claims have been proved by a preponderance of the evidence -- as I have explained that term to you -- then plaintiffs are entitled to recovery of money damages against any or all of the defendants whom you find to have been responsible for the actions upon which such claims are based.

PLAINTIFFS' JURY INSTRUCTION NO. 2

(Multiple Plaintiffs)

D.C. Bar form book instruction 4-1, changing the word "two" to "nine"

PLAINTIFFS' JURY INSTRUCTION NO. 3

(Evidence in the case)

D.C. Bar form book instruction 2-1

PLAINTIFFS' JURY INSTRUCTION NO. 4

(Inferences)

D.C. Bar form book instruction 2-2

PLAINTIFFS' JURY INSTRUCTION NO. 5

(Function of the Court)

D.C. Bar form book instruction 1-1

PLAINTIFFS' JURY INSTRUCTION NO. 6

(Function of the Jury)

D.C. Bar form book instruction 1-2



PLAINTIFFS' JURY INSTRUCTION NO. 7

(Burden of Proof)

D.C. Bar form book instructions 2-8

PLAINTIFFS' JURY INSTRUCTION NO. 8

(Testimony of Law
Enforcement Officers)

In this case, many of the defendants are or were either police officers or employees of the Federal Bureau of Investigation. The testimony of a law enforcement official is entitled to no special or exclusive sanctity. An official who takes the witness stand subjects his testimony to the same examination and the same tests that any other witness does, and in the case of such officials you should not believe them merely because they are law enforcement officials. You should recall their demeanor on the stand, their manner of testifying, the substance of their testimony, and weigh and balance it just as carefully as you would the testimony of any other witness. People employed by the government, including law enforcement officials, do not stand in any higher station in the community than other persons and their testimony is not entitled to any greater weight.

PLAINTIFFS' JURY INSTRUCTION NO. 9

(Introduction)

Federal law prohibits that any individual may seek redress in this Court, by way of money damages and by injunctive relief, against any government body which deprives a citizen of rights guaranteed to them by the United States constitution. In this case, the plaintiffs have charged that the individual defendants acting in their capacity as agents of the Federal Bureau of Investigation and the District of Columbia Metropolitan Police Department have conspired to deprive the plaintiffs of their constitutional rights. I will instruct you as to the elements of each alleged violation and you must determine, as I have previously instructed you, the liability of each defendant with respect to the plaintiffs.



PLAINTIFFS' JURY INSTRUCTION NO. 10

(Specific Intent)

It is not necessary to find that the defendants had any specific intent to deprive the plaintiffs of their constitutional rights in order to find in favor of the plaintiffs. The plaintiffs are entitled to relief if the defendant intended the actions which resulted in a violation of the plaintiffs' rights. Gomez v. Toledo, 100 S.Ct. 1920 (1980); Monroe v. Pope, 365 U.S. 167 (1961); Pierson v. Ray, 386 U.S. 547 (1967).

PLAINTIFFS' JURY INSTRUCTION NO. 11

(Supervisory Liability)

Some of the defendants in this case are supervisory officers who did not personally commit the specific acts alleged to violate the plaintiffs' constitutional rights. Supervisory officers may be held liable for a violation of the plaintiffs' rights if their own conduct was a proximate cause of the violation.

A supervisory officer subjects a person to a violation of his constitutional rights if he (1) affirmatively orders or commits such a violation (2) acquiesces in another's affirmative act, or (3) omits to do something which he is required to do, and that act or omission causes the violation of which the plaintiffs have complained. Personal participation in the immediate act which violated the plaintiffs' rights is not required. It is sufficient if the supervisor sets in motion a series of acts by others, or knowingly refuses to terminate a series of acts by others which he knows or reasonably should know would cause others to inflict the constitutional injury. I will instruct you further with respect to each of the alleged violations. Lessman v. McCormick, 591 F.2d 605 (10 Cir. 1979); Maiorana v. MacDonald, 596 F.2d 1072, 1077 (1st Cir. 1979); Johnson v. Duffy, 588 F.2d 740, 743-744 (9th Cir. 1978); McClelland v. Facticeau, 610 F.2d 693, 695-696 (10th Cir. 1979); Sims v. Adams, 537 F.2d 829 (5th Cir. 1976); Hengel v.

Gerstein, 608 F.2d 654 (5th Cir. 1979).

PLAINTIFFS' JURY INSTRUCTION NO. 12

(Conspiracy-Definition)

As part of their theory of liability, the plaintiffs have alleged that the defendants engaged in a conspiracy to violate their constitutional rights.

A conspiracy exists when two or more persons reach an understanding to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. It is in essence a combination to disobey or disregard the law. The understanding between the members need not be an express or formal agreement. Thus, a conspiracy is seldom able to be proved by direct evidence. Rather, the existence of a conspiracy may be inferred from a series of events and may be proved by circumstantial evidence.

Although a common design is the essence of conspiracy, the law does not demand proof that each conspirator knew the exact limits of the illegal plan, or the identify of all the participants in it. It does require that there be a single plan, the essential nature and general scope of which is known to each person who is to be held responsible for its consequences. It is not necessary for the plaintiff to prove that the defendants came together and, in so many words, agreed upon the matter. If it is proved that the defendants pursued the same object, one performing one part and another performing another part, you will be justified in concluding that they are engaged in conspiracy to effect the object.

Adickes v. S. H. Kress Co., 398 U.S. 144 (1970); Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), rev'd in part on other grounds, 100 S.Ct. 1987 (1980); Hoffman-LaRoche, Inc. v. Greenberg, 447 F.2d 872, 875 (7th Cir. 1971).

PLAINTIFFS' JURY INSTRUCTION NO. 13

(Conspiracy)

In the present case, plaintiffs claim that defendants conspired to



prevent them and others like them from exercising their first amendment rights of free speech, assembly and privacy and their fourth and fifth amendment rights guaranty of freedom from unreasonable searches and seizures, and of due process. If you should find by a preponderance of the evidence that defendants intended to do this, or that defendants intended to accomplish some lawful purpose by such unlawful means, this would constitute the kind of unlawful agreement that is essential to a civil conspiracy. This means that if you should find that the defendants were attempting to accomplish a lawful purpose -- such as criminal investigation -- but using unlawful methods or tactics to accomplish that purpose -- such as excessive use of informants beyond that necessary to accomplish their lawful purpose, such methods or tactics would be clearly unlawful and in violation of basic constitutional rights, even if the over-all objective were lawful, and would constitute a civil conspiracy.

A conspiracy requires, in addition to an agreement or understanding among the parties, that there be one or more lawful acts in furtherance of the conspiracy.

Plaintiffs have alleged that there were a great many unlawful acts in furtherance of the conspiracy, including the following:

- (1) Use of informants to infiltrate and report on lawful first amendment activities in excess of that needed to carry out any legitimate law enforcement purpose
- (2) Use of informants or police officers to provoke confrontations with the police such as at the Three Sisters Bridge demonstration
- (3) Surreptitious preparation of documents by defendants such as the Head Tax letter and the Rational Observer designed to interfere with plaintiffs' free exercise of their first amendment rights
- (4) Breaking and entering into offices of plaintiffs and removing materials from them
- (5) placing plaintiffs' names on lists of persons to be detained without any notice, redress, or their due process rights.

It is not necessary that you find that the defendants committed all of the above acts; if you should find that the defendants committed only one of these acts, that would be sufficient to meet the requirement that there be one or more overt acts in furtherance of the conspiracy.

PLAINTIFFS' JURY INSTRUCTION NO. 14

(Liability of
Co-conspirators)

Each conspirator is responsible for everything done by co-conspirators which follows from the execution of the common design as one of its probable and natural consequences, even though it was not intended as part of the original design. A defendant, therefore, who is proved to be a member of a civil conspiracy is laible for a plaintiff's injuries caused by the conspiracy, even if his own personal acts did not proximately contribute to that injury.

You are further instructed that it is not necessary, in order to establish the liability of a participant in an unlawful conspiracy, to show that he was a party to its contrivance at its inception. In other words, a conspiracy may start with a few participants, then add others as it progresses; if so, the conspirator who becomes a part of the conspiracy at or near the end is just as much responsible for the damage that results as the one who was in it at the beginning. The actual time when any of them might have come into the understanding makes no difference. Therefore, it is shown that the individual who came in at a later date knew of the unlawful design and willfully aided in its execution, he is chargeable with the consequences that flowed from it.

PLAINTIFFS' JURY INSTRUCTION NO. 15

(Joint Liability
of Tortfeasors)

Where two or more persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or performing it under circumstances which fairly charge them with intending

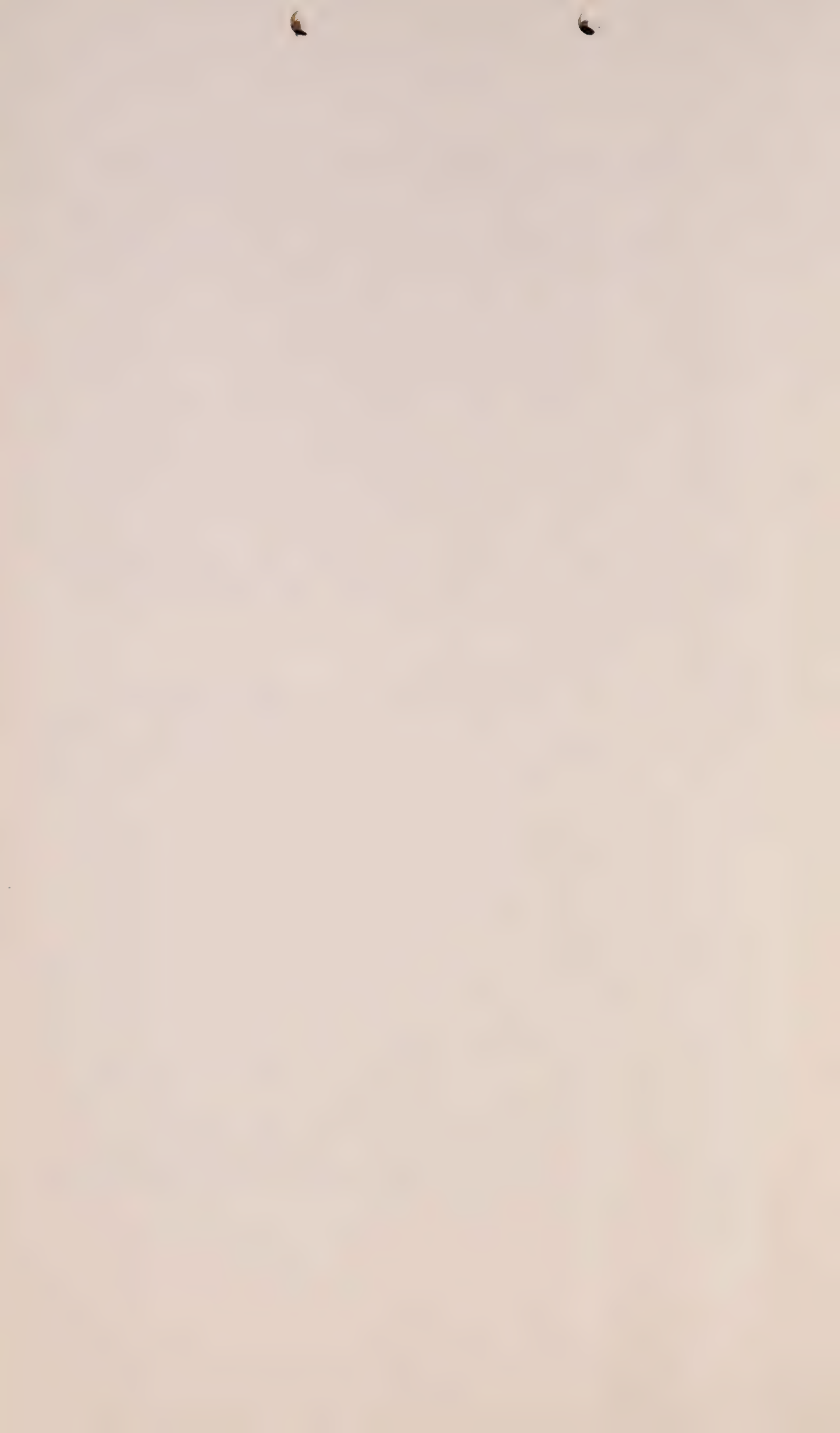


the consequences which follow, they incur a joint and several liability for the acts of each and all of the joint participants. The law does not require the injured party to establish how much of the injury was done by one person and how much of the injury was done by another. Rather, it permits the injured party to treat all concerned in the injury jointly and all are liable to respond to the plaintiff in a total sum as damages. All those who actively participate in a wrongful act, by cooperation or request, or who lend air or encouragement to the wrongdoers, or ratify and adopt his acts for their benefit, are equally liable with him. Express agreement is not necessary, and all that is required is that there should be a common design or understanding, even though it be a tacit one. Prosser, Law of Torts, §46, 4th. Ed. 1971, pp. 291-295.

PLAINTIFFS' JURY INSTRUCTION NO. 16

(Respondent Superior)

In addition to the individual defendants, the District of Columbia is also charged as a defendant in the case. If you find that any of the individual defendants employed by the District of Columbia violated the constitutional rights of any of the plaintiffs, you must find the municipality liable as well, if you find that the police officers were employed by the District and were acting together the scope of their employment simply means that the officer was engaged in police business at the time of the incident. You do not have to conclude that the District had ordered or even was aware of, the specific conduct of the officer in order to find the District liable. The District will be liable even for the intentional wrongful acts of the officer, if the rights of such individual is not unforeseeable given the general nature of the police work. Restatement of Agency Second, §245, Prosser, Law of Torts, 4th Ed. 1971, p. 464.



PLAINTIFFS' JURY INSTRUCTION NO. 17

(Shift of Burden of Proof)

I previously instructed you that plaintiffs generally bear the burden of proof. There are some circumstances, however, in which the burden of proof as to some facts shifts to the defendants.

Plaintiffs claim that the purpose of, or a substantial motive for, defendants' alleged use of informants to gather information was to use that information to formulate plans to disrupt or counteract plaintiffs' exercise of their constitutional rights. If you find that this was the sole motive for defendants' actions then you must conclude they acted in violation of plaintiffs' rights.

If, however, you find that a purpose of defendants' activities was to disrupt or counteract plaintiffs' exercise of their constitutional rights, but you also find that defendants undertook their activities in part because of other reasons, which were lawful, then you must determine if the defendants have produced proof which would establish by a preponderance of the evidence that they would have engaged in the same activities, to the same degree, even absent any unlawful motive. You must also determine whether it would have been reasonable for defendants to have engaged in the same activities, to the same degree, if they had been motivated solely by a lawful purpose. By the same degree, I mean the same nature, scope, and duration. If you find that defendants' activities exceeded the scope of what they would reasonably have done, absent improper motivation, then you must find they acted in violation of plaintiffs' rights.

PLAINTIFFS' JURY INSTRUCTION NO. 18

(Good Faith Defense-
Individual)

The defendants have asserted as a defense that they were acting in good faith when they carried out the activities alleged as violations. If you find this defense, as I define it for you, to be valid, you may find the defendants not liable even if you find



that one or more of them committed certain acts in violation of plaintiffs' rights.

To establish this defense, the defendant must convince you by a preponderance of the evidence of several matters. First, he must prove that he actually did believe, at the time, that the action he took was lawful. As the trier of fact, it is for you to determine the credibility of the defendant's claim that he believed his acts to be lawful. You may consider in this regard whether you find the other actions of the officer at the time and subsequent to the incident consistent with his claim that he believed he was acting legally. Consider as well the general credibility of this defendant.

Second, the officer must prove that he held such a belief in good faith. If you find that the defendant was motivated by malice for the plaintiff, or acted in callous disregard of or with indifference for the plaintiff's rights, you must find the officer liable to the plaintiff.

Third, the defendant must prove that it was reasonable for him to reach the conclusion he did. You will not even consider this part of the case unless you have found the plaintiff's rights were violated. Thus, you may start from the proposition that the officer was, at the least, mistaken about the legality of his conduct. You must decide whether his mistake was the sort that a reasonably prudent police officer might make.

In this respect, there are two conditions that the officer must satisfy in order to establish this part of the defense. He must prove both that at the time he took the action there was substantial confusion in the law, and that he relied upon some legal authority to support his actions. An officer is not allowed



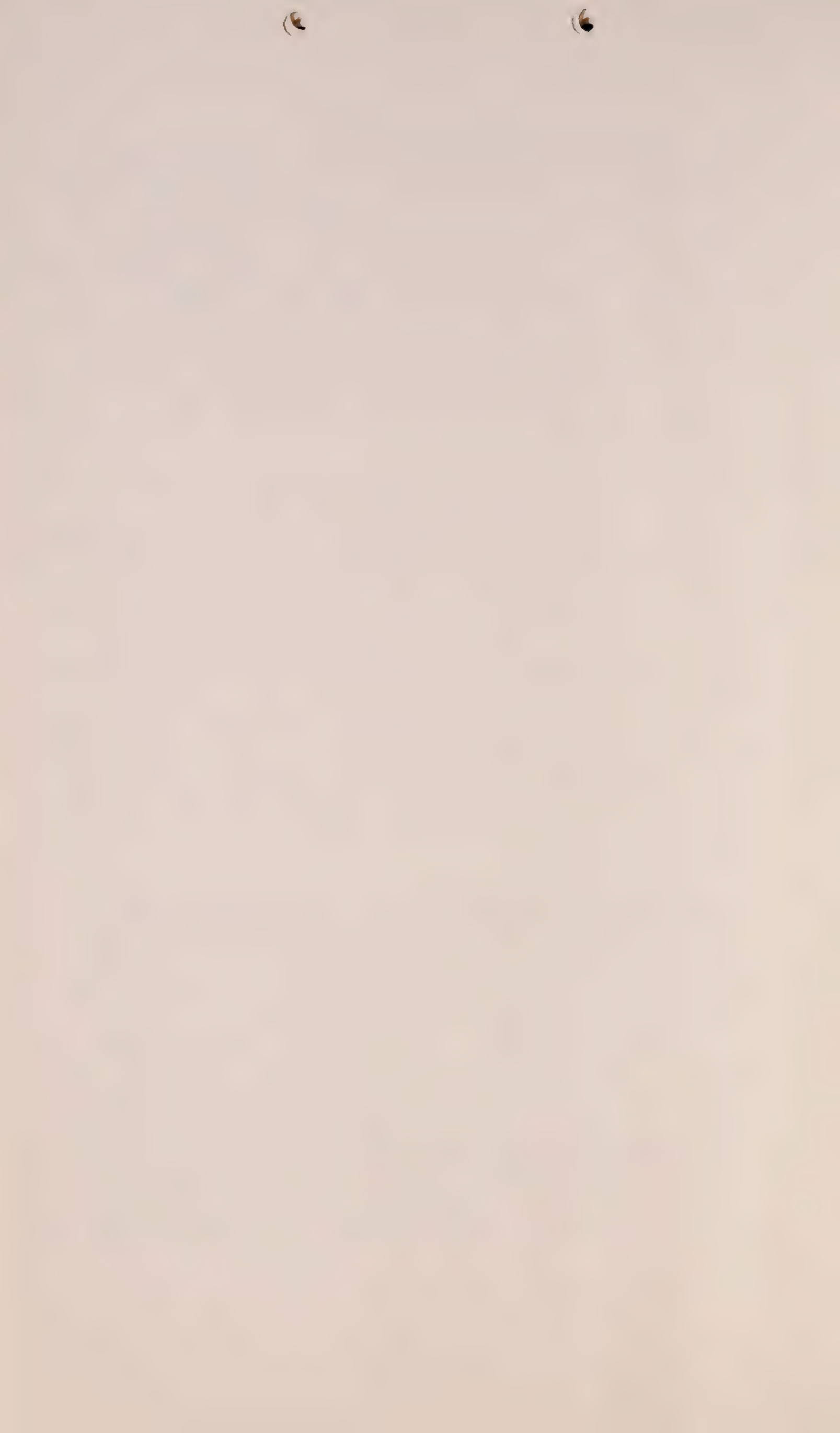
to act in violation of settled law, or to violate the clearly established constitutional rights of the plaintiff. Thus, if you find that the constitutional rights of the plaintiff were clear, you must render judgment for the plaintiff. However, the mere fact that the law was in dispute is not sufficient to establish a defense for the officer. He must, in addition, prove that he relied on some legal authority to establish that his view of plaintiff's constitutional rights was reasonable, although ultimately mistaken.

The burden of proof as to all of these elements is on the defendant. The plaintiff does not have to prove that the officer acted from malice, or that the officer intended to violate her rights. Rather, the burden is upon the officer to prove by a preponderance of the evidence that any violation of plaintiff's rights was occasioned by his reasonable good faith belief that his actions were lawful. Gomez v. Toledo, 100 S.Ct. 1920 (1980); Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972); Wood v. Strickland, 420 U.S. 308 (1975); Fidtler v. Rundle, 497 F.2d 794 (3d Cir. 1974); Glasson v. City of Louisville, 518 F.2d 899 (7th Cir. 1975).

PLAINTIFFS' JURY INSTRUCTION NO. 19

(Good Faith Defense-
District of Columbia)

You have been instructed that an individual who violated the plaintiff's rights may still have a defense, in certain circumstances, if he believed that the action he took was lawful and if he acted in good faith. This is not true of the defendant District of Columbia. If you find that the actions of the defendant District of Columbia violated the plaintiff's rights, then you must return a verdict against the District of Columbia, even if the actions of its employees were taken in good faith. The Court has already instructed you on the standards by which you



should determine whether the District of Columbia itself violated the plaintiff's rights, and you are to determine the question of the District of Columbia's liability based solely on those instructions. The good faith of the individual defendants and of the District of Columbia itself should not be considered by you in determining the liability of the District of Columbia. Owen v. City of Independence, Missouri, 100 S.Ct. 1338 (1980).

PLAINTIFFS' JURY INSTRUCTION NO. 20

(Violation of First Amendment Rights to Free Expression, Assembly and Associational Privacy)

Having outlined for you the bulk on which you must judge the liability of each defendant with respect to the claims of violations of constitutional rights, I will now set forth for you the standards by which you must judge each of the individual claims.

The first amendment to the constitution of the United States reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

This means that the government may not, except within very narrow limits, interfere with the right of individuals to speak as they please, to assemble with others, and assemble and publicly criticize the government as they please. These are extremely important and precious rights, which are basic and fundamental to our free and democratic form of government. Under our form of government no one -- not even the President himself -- has the right to trample on these rights, and if they do, they submit themselves to liability for money damages to those upon whose rights they trample.



A. Freedom of Speech

Freedom of speech is one of the most basic concepts in the entire constitution. It is intended primarily to protect minority views. It is the very expression of views with respect to controversial political issues that most requires the protection of this amendment. Freedom to express differing opinions is not limited, under the constitution, to things which do not matter much, but applies equally to things which touch the heart of our government and social order. A function of free speech is to invite dispute, and it may best serve its high purpose when it brings about a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

Freedom of speech means the right to express attitudes of defiance or even contempt toward the government. We have made a national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government. It may include advocacy that the government should be overthrown, even by force and violence. Only if such speech creates a clear and present danger of inciting the audience to break the law, then and there, is the advocacy not protected by the constitution.

The government may never take action for the purpose of disrupting, inhibiting, counteracting or preventing constitutionally protected speech.

Sometimes government action not specifically intended to disrupt, inhibit, counteract or prevent speech, nonetheless has that effect. Whether such action violates the constitution depends on whether the purpose of the government action is legitimate and substantial, and whether the action taken is limited to that reasonably necessary to accomplish that purpose. Only government

action confined within these limits is permissible. If the government action exceeds these limits, that action violates the first amendment.

Plaintiffs claim defendants acted for the purpose of disrupting or counteracting their freedom of speech, or that defendants' acts, if not so motivated, exceeded permissible limits. If you find either is the case you must determine that defendants violated plaintiffs' right to free speech.

B. Associational Privacy

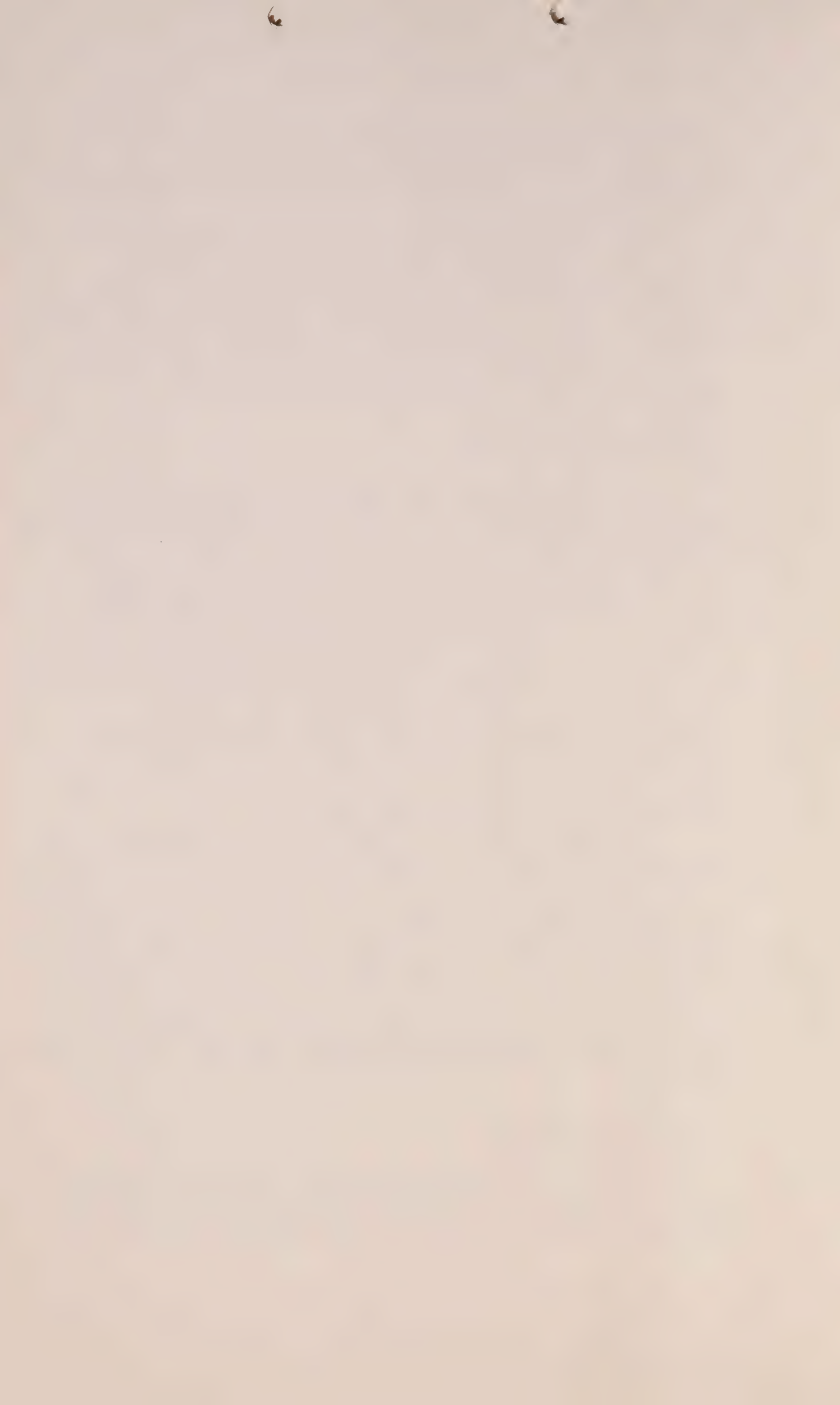
The first amendment also embraces the right to associate for lawful ends, and to do so privately, without unwarranted intrusion. The right of associational privacy includes the right to meet privately with others to discuss politics and to plan lawful group activities. The right of associational privacy embraces the right to keep private the names of the members or associates of the group.

The right of associational privacy is not absolute. The principles defining its scope are analogous to those governing freedom of speech. The government may never take action for the purpose of invading associational privacy.

Furthermore, government action having the unintended effect of invading associational privacy is legitimate only if it serves a substantial legitimate purpose and is limited to that reasonably necessary to accomplish this purpose. Government action exceeding these bounds violates the first amendment right of associational privacy. It is for you to determine whether defendants committed acts exceeding these bounds and invading plaintiffs' associational privacy.

C. Freedom of Assembly

The right of peaceful assemblage is intended to guarantee the rights of people to associate together and to advocate and



promote legitimate political or social action, no matter how controversial. Peaceful, orderly expressions of views, through marches, demonstrations, or otherwise, cannot be prohibited or otherwise interfered with, merely because the views expressed may be so unpopular at the time as to stir the public to anger, or invite dispute. Of course, the right to assemble peaceably to discuss national issues includes the right not to be arrested or assaulted by government agents for exercising such privilege. It includes the right not to have the assembly or arrangements for it disrupted by government agents. It also includes the right to be free of government retaliation for peacefully assembling and to be free from government intimidation of those desiring to peacefully assemble.

If you find defendants acted for the purpose of deterring, counteracting, disrupting, or punishing plaintiffs' efforts to plan, carry out, or obtain the attendance of others at an assembly planned to be peaceful, then you must find defendants violated plaintiffs' right of peaceable assembly, unless of course you find that a plaintiff attended the assembly and personally did not remain peaceful.

If you find defendants did not act for the purpose of deterring, counteracting, disrupting, or punishing peaceful assembly, but took action that had that effect, you must determine whether the government's action was for a substantial legitimate purpose and was limited to that reasonably necessary to accomplish that purpose. If it was not then again you must find defendants to have violated the constitution.

Brandenburg v. Ohio, 395 U.S. 444 (1969); Buckley v. Valeo, 424 U.S. 1 (1976); NAACP v. Alabama, 357 U.S. 449 (1958); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977).



PLAINTIFFS' JURY INSTRUCTION NO. 21

(Peaceful Privacy)

Plaintiffs claim infringement of their personal, as well as associational privacy. The right to personal privacy encompasses the right to be free from wrongful intrusion by the government into one's private activities. Public disclosure of an individual's private affairs, about which the public has no legitimate concern, is an invasion of privacy. However, where the information was obtained by improperly intrusive means, public disclosure is not necessary to complete the wrong. The plaintiffs allege that the defendants intruded upon their privacy by using informants or undercover police to learn plaintiffs' political beliefs and to gather information concerning their personal, non-political activities.

If you find that the defendants did so, and did so for the purpose of invading plaintiffs' privacy, or for another illegitimate purpose, then you must find that defendants violated plaintiffs' right to privacy.

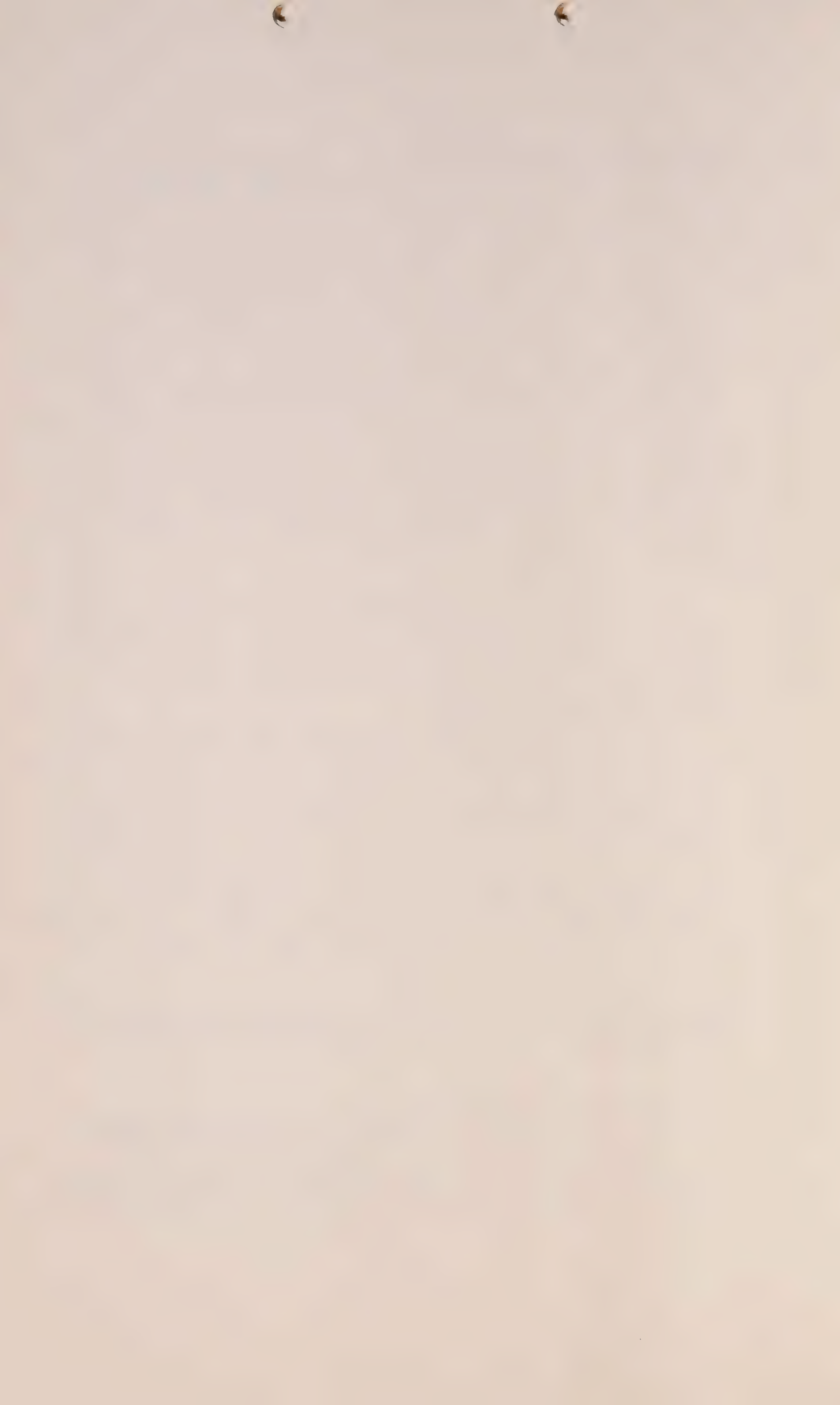
If you find the defendants so used undercover officers or informants, but did so for a substantial, legitimate purpose, then you must determine whether the defendants' acts were reasonably limited to those necessary to accomplish that purpose, or whether they exceeded the bounds of reasonable necessity. If you determine defendants' acts exceeded the bounds of reasonable necessity, then you must determine that they violated plaintiffs' right to personal privacy.

Whalen v. Roe, 429 U.S. 589 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965).

PLAINTIFFS' JURY INSTRUCTION NO. 22

(Compensatory Damages)

If you should find the defendants violated plaintiffs' constitutional rights you must determine the amount of damages to which they are entitled for any violation. If you find plaintiffs



suffered stress or other mental or emotional harm from the violation of their rights, you must also determine the amount to which they are consequently entitled.

There are no strict mathematical formulas for the measurement or evaluation of the loss of constitutional rights. It is for the jury to apply its own judgment and experience in determining fair compensation for the loss of such rights, taking into consideration all of the facts and circumstances.

PLAINTIFFS' JURY INSTRUCTION NO. 23

(Punitive Damages)

You may also decide whether the plaintiff is entitled to the award of any punitive damages. The function of punitive damages is to punish the defendant for malicious conduct and to deter similar conduct by others. Whether you decide to award any punitive damages should be based on whether you find that the defendants acted willfully, deliberately, maliciously, or with reckless disregard of the plaintiff's constitutional rights. If you find that they have done one of those things, then you should award punitive damages.

Punitive damages may be awarded even if the violation of plaintiff's rights resulted in only nominal compensatory damages. That is, even if the plaintiff can show no damages or other injury as a result of the defendants' actions, if these actions were deliberate, willful or made with reckless disregard of plaintiff's rights, punitive damages are appropriate.

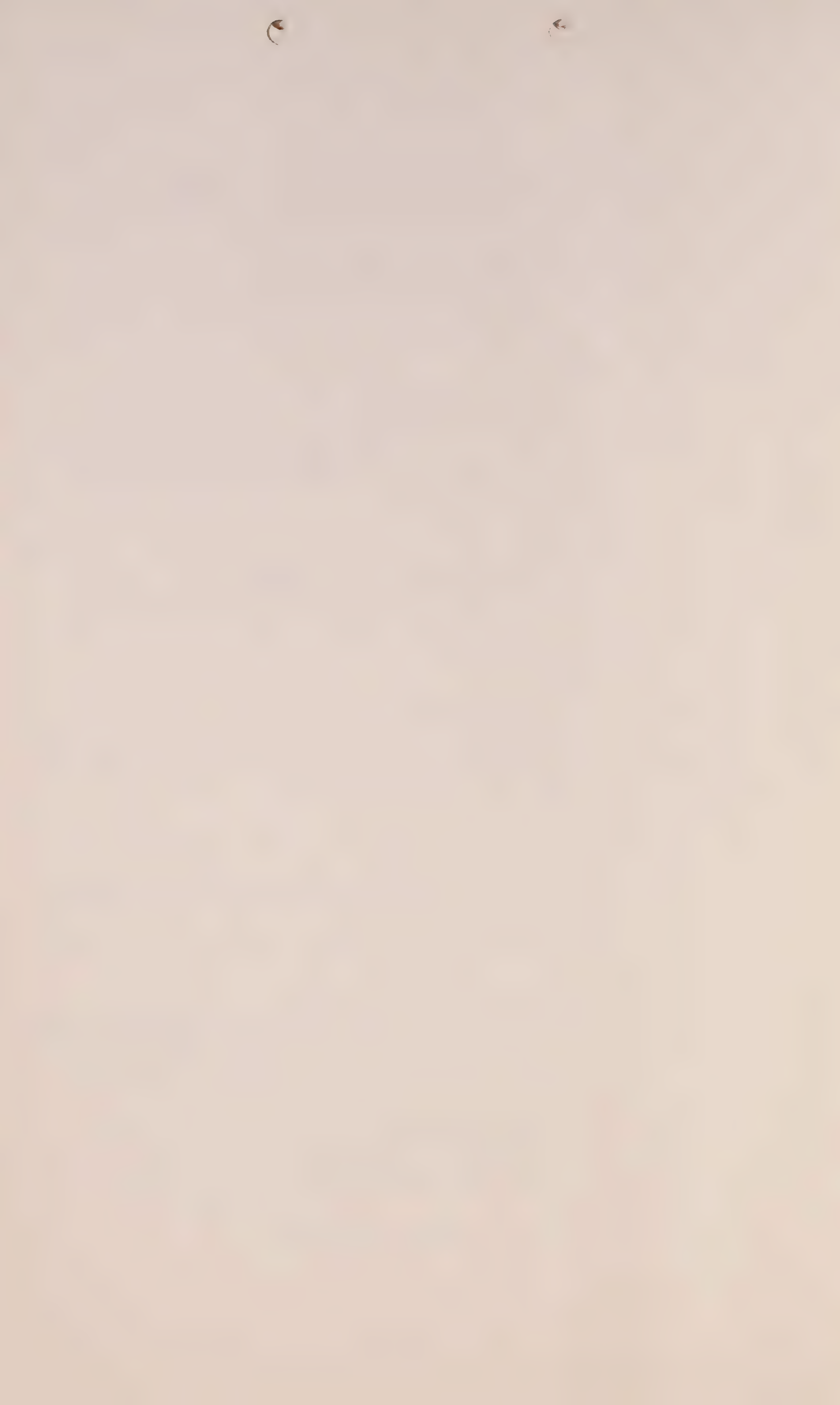
Cochetti v. Desmond, 572 F.2d 102, 105-06 (3d Cir. 1978); Stolberg v. Board of Trustees, 474 F.2d 485 (2d Cir. 1973); Adickes v. S. H. Kress & Co., 398 U.S. 144, 234 (1970) (Brennan, J., concurring); Guzman v. Western State Bank, 540 F.2d 948, 953 (8th Cir. 1976); Basista v. Weir, 340 F.2d 74 (3d Cir. 1965). Cf. Carey v. Piphus, 435 U.S. 247 (1978).

C. Plaintiffs' Proposed Special Verdict Form

1. Do you find that the federal defendants and the D.C. defendants participated in a conspiracy or conspiracies to deprive some or all of the plaintiffs of their civil rights?
Yes or no.
2. If yes, were all of the plaintiffs victims of the conspiracy or conspiracies?
Yes or no.
3. If no, which plaintiffs were victims of the conspiracy or conspiracies.
4. Did all of the defendants participate in the conspiracy or conspiracies?
Yes or no.
5. If no, which ones did?
6. Do you find that the defendants intentionally interfered with the plaintiffs' first amendment rights to freedom of speech and assembly?
Yes or no.
7. If yes, do you find that each of the plaintiffs were so interfered with?
Yes or no.
8. If no, then which of the plaintiffs were so interfered with?
9. Did all of the defendants interfere with the plaintiffs' first amendment rights to freedom of speech and assembly?
Yes or no.
10. If no, list which defendants did interfere.
11. Do you find that the defendants subjected the plaintiffs to unreasonable search and seizure in violation of the fourth amendment?
Yes or no.



12. Do you find that all plaintiffs were so subjected?
Yes or no.
13. If no, list which ones were.
14. Did all defendants subject plaintiffs to unreasonable search and seizure?
Yes or no.
15. If no, list which ones did.
16. Do you find that any of the plaintiffs' conversations were overheard by means of an illegal wiretap or electronic surveillance?
Yes or no.
17. If yes, which plaintiffs were overheard?
18. Were all the defendants responsible for the plaintiffs being overheard?
Yes or no.
19. If no, list which ones were?
20. Do you find that defendants intentionally interfered with the plaintiffs' right to privacy?
Yes or no.
21. If yes, which plaintiffs?
22. Did all the defendants intentionally interfere with the plaintiffs' right to privacy?
Yes or no.
23. If no, list which defendants did.
24. Do you find that defendants interfered with the plaintiffs' due process right to notice and opportunity to respond?
Yes or no.
25. If yes, which plaintiffs?
26. Did all defendants so interfere?
Yes or no.
27. If no, list which defendants did.



28. In reference to the facts in this case, did the D.C. defendants and the FBI defendants act as joint tortfeasers, i.e., two persons or more acting in concert even if it was merely a tacit agreement?

Yes or no.

29. Do you find that the D.C. defendants were acting within the scope of their employment at the time that they did the things that were alleged by the plaintiffs?

Yes or no.

30. Do you find the plaintiffs are entitled to money damages from the defendants to compensate them for injury to their civil rights?

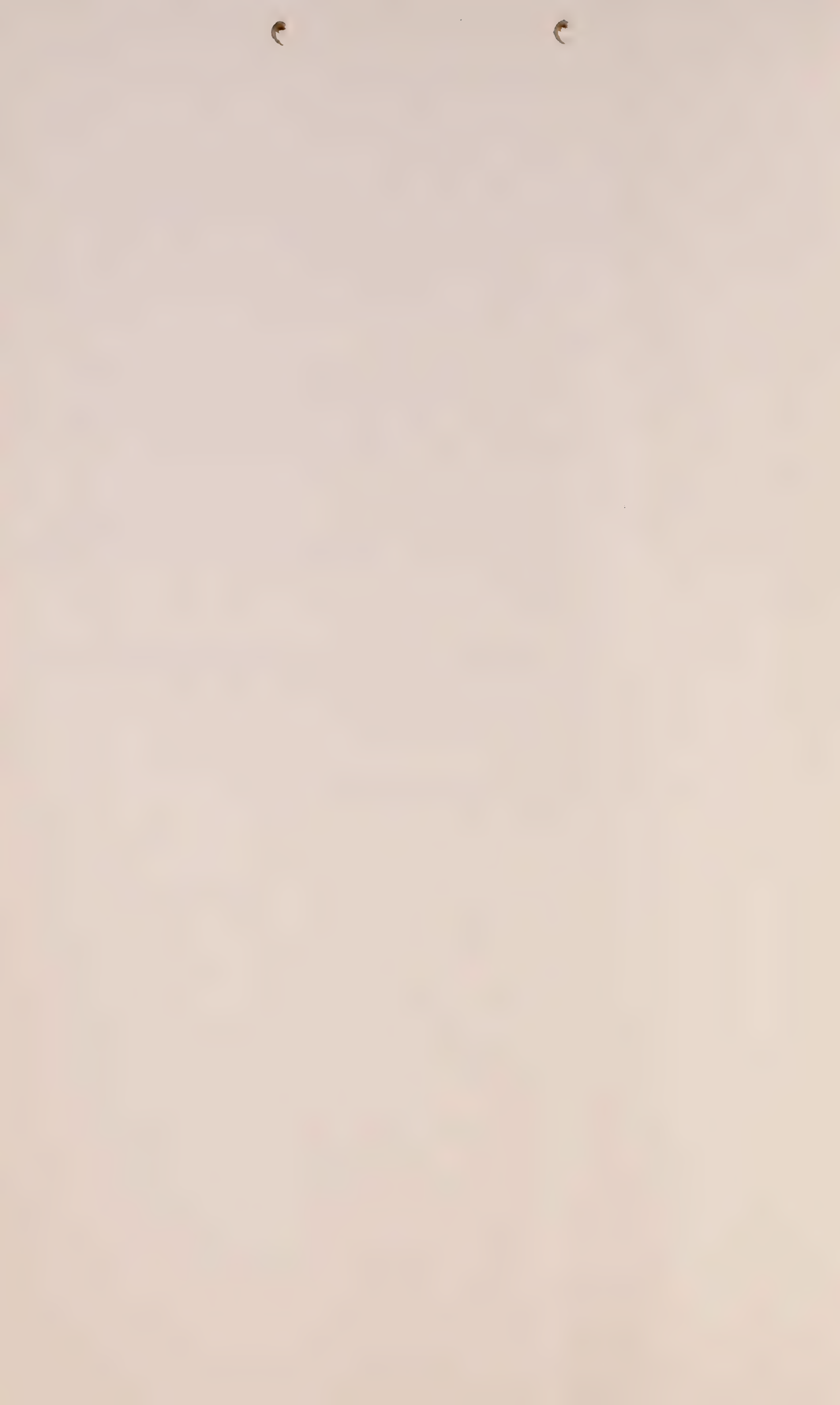
Yes or no.

31. If yes, indicate how much each plaintiff should be awarded.

32. Do you find that the plaintiffs are entitled to punitive damages from the defendants?

Yes or no.

33. If yes, list which defendants.



D. Text of §1985(3)

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing plaintiffs' pre-trial brief, appendix, and exhibits was hand delivered to David White Department of Justice and mailed to Laura Bonn, Assistant Corporation Counsel, District Building, 14th and E Streets, N.W. Washington, D.C. 20004 this 22nd day of October, 1981.


Daniel M. Schember

DC Pre-Trial Brief

UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY WILSON, et al. :
Defendants :

PRE-TRIAL BRIEF OF DISTRICT OF COLUMBIA DEFENDANTS

Pursuant to the Court's Order of March 17, 1981, the District of Columbia defendants hereby file their pre-trial brief.

I. List of Witnesses:

The District of Columbia defendants may call the following witnesses at trial.

1. All parties.
2. All persons listed as witnesses in plaintiffs pre-trial brief or called by plaintiffs at trial.

Robert Deso will testify about his knowledge of the activities of the Intelligence Division given at Counsel for the Metropolitan Police Department. 1 hr. during the late 1960's early 1970's.

II. Facts To Be Proven:

A. The District of Columbia defendants propose to prove the following facts at trial in addition to the facts stated in our counter-responses to plaintiffs allegations:

1. During the late 1960's the Intelligence Division of the Metropolitan Police Department was organized pursuant to General Order 7-6-4. (Wilson, Ferguson).
2. The purpose of the Intelligence Division was to gather, record and provide to appropriate elements of the Metropolitan Police Department, information on persons, groups and organizations whose activities might lead to

violence or other civil disobedience detrimental to the proper functioning of local, state or national government. (Wilson, Ferguson, General Order 7-6-4).

3. The Intelligence Division was also charged with the responsibility of establishing and maintaining intelligence liason with other governmental agencies and organizations. (Wilson, Ferguson).

4. The Intelligence Division was responsible for collecting, catalogueing, and dissiminating information on individuals and groups that are involved and subversive, activities and for demonstrations which could cause civil disorder requiring a police response. (Wilson, Ferguson, General Order No. 7-6-4).

5. Plaintiffs knew or should have known of their cause of action against the District of Columbia defendants at least three years before they filed their complaint. (Depositions of Booker, Bloom, Pollock, Waskow and T. Hobson).

6. There was no fraudulent concealment of information on the part of the Metropolitan Police Department such as would toll the statute of limitations. (Wilson, Ferguson, Zink, Depositions of Pocker, Bloom, Waskow and T. Hobson).

B. Response of District of Columbia
to Plaintiff's Allegations
Against District of Columbia
Defendants*

Allegation: 1. During the late 1960's and early 1970's defendants were employed as follows:

a. Defendant Gildon, Jagen, Bynum, Mahaney, Day and James Binsted were Metropolitan Police Department (MPD) Officers assigned to the Intelligence Division. (Gildon; Jagen; Bynum; Mahaney; Day; J. Binsted).

*/For the Court's convenience, plaintiffs allegations have been quoted and each allegation is followed by defendants counter-responses to that allegations.

Allegation: b. Defendant Shoffler was a MPD officer who supervised MPD informants who investigated, disrupted, and counteracted plaintiffs' exercise of constitutional rights. (Shoffler).

Counter-Response:

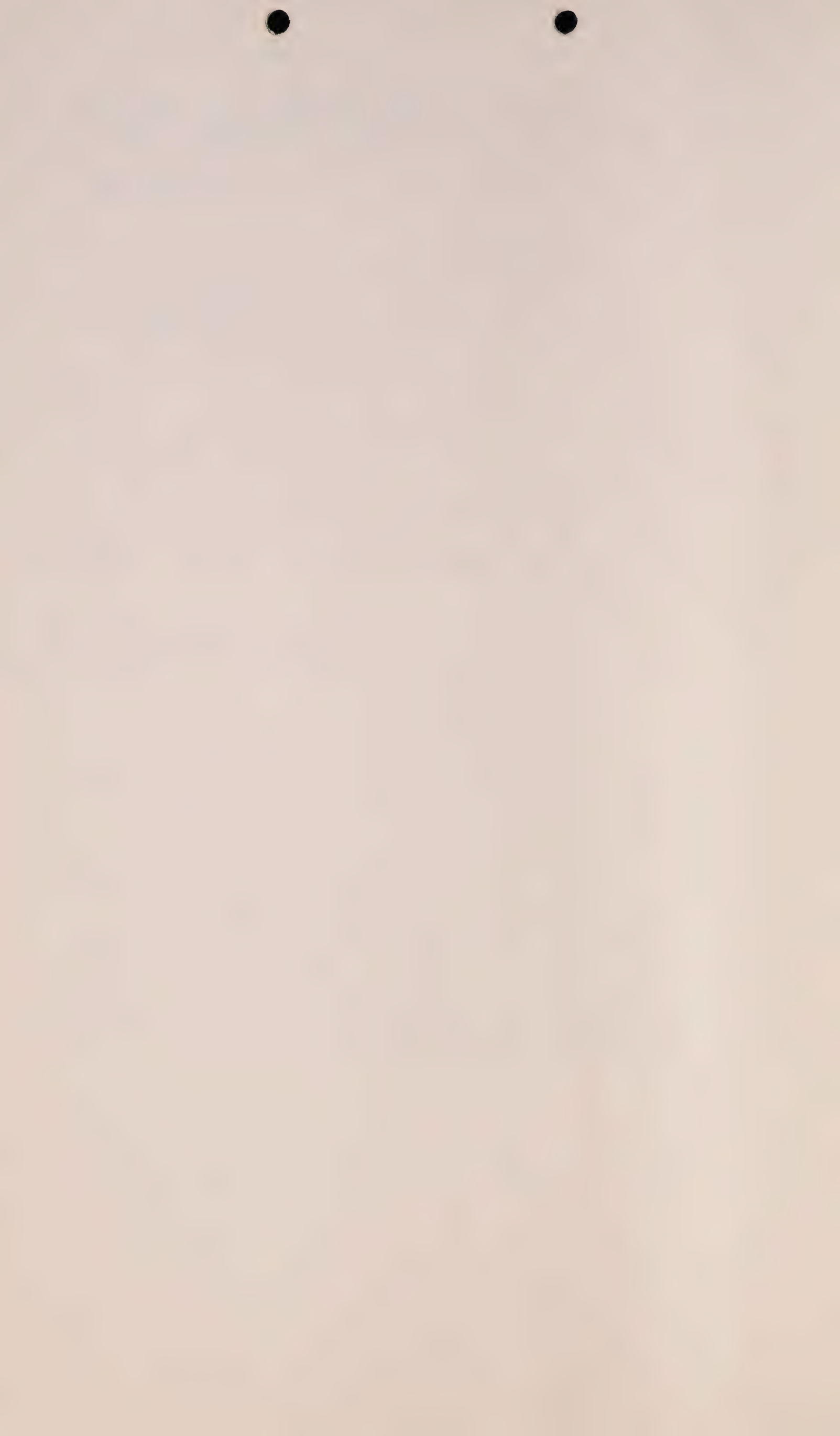
Defendant Shoffler admits that he worked as an M.P.D. Officer and supervised informants, but denies that these informants investigated, disrupted and counteracted plaintiffs' exercise of constitutional rights. The informants used by the M.P.D., during the relevant time periods were employed to assist the M.P.D. in gathering information on demonstrations to be held in the District of Columbia which might cause a disruption in the Governmental functions or create civil disobedience or cause violence. (Shoffler, Ferguson).

Allegation: c. Defendants Dorie Binsted and Markovich were MPD Intelligence Division informants. (D. Binsted; Gildon).

Counter-Response:

Defendant Markovich was a paid informant of M.P.D. during relevant period of time, but Dorie Binsted was not a paid informant or employee of the M.P.D. during the relevant period of time.

Allegation: d. Defendant Scraper was a sergeant in the M.P.D. assigned to the Intelligence Division who supervised defendants Gildon, Jagen, Bynum, Mahaney, Day, James Binsted, Dorie Binsted, and Markovich, and directed or approved their activities and those of other Intelligence Division officers and informants. (Scraper).



Counter -Response:

Defendant Scrapper admits that as an M.P.D. sergeant in the Intelligence Division he supervised defendants Cildon, Jagen, James Binsted, and Markovich; however, he denies that he directly supervised defendants Bynum, Mahaney, Dolores Binsted.

Further, defendant Scrapper denies that he directed or approved any illegal or improper activities. (Scrapper)
Allegation: e. Defendant Acree was first a sergeant and later a lieutenant in the MPD assigned to the Intelligence Division; as a sergeant he collaborated with, and had authority and responsibility equal to that of defendant Scrapper as a lieutenant defendant Acree retained this authority and responsibility and assumed authority and responsibility to direct or approve the activities of all sergeants in the Intelligence Division, and their subordinates. (Acree)

Counter-Response:

Defendant District of Columbia admits that defendant Acree was a sergeant and later was promoted to the rank of lieutenant in the M.P.D. while assigned to the Intelligence Division. Defendant Acree had authority and responsibility equal to that of defendant Scrapper and at various times discussed matters concerning his work and responsibilities in the Division with defendant Scrapper. While on duty, defendant Acree had supervisory responsibilities with regard to those subordinates on duty in the Intelligence Division; however, it is an overstatement to allege that he had "authority and responsibility to direct or approve the activities of all sergeants ***." (Acree, Scrapper)
Allegation: f. Defendant Suter was first a lieutenant and later a captain in the MPD assigned to the Intelligence Division; he supervised all Intelligence Division informants and officers, other than the director of the Division, and

directed or approved their activities. (Suter)

Counter-Response:

Defendant Suter admits that he was first a lieutenant and later promoted to captain in the Intelligence Division. While on duty, defendant Suter had supervisory responsibilities with regard to the officers and informants on duty and employed by M.P.D. in the Intelligence Division. However, it is an overstatement to allege that he had "directed or approved their activities." (Suter)

Allegation: g. Defendants Herlihy, Ferguson, and Zink were, successively, directors of the Intelligence Division of the MPD holding the rank of Inspector; they supervised all Intelligence Division informants and officers and directed or approved their activities. (Herlihy,; Ferguson; Zink)

Counter-Response:

Defendants Herlihy, Ferguson and Zink admit that they successively were directors of the Intelligence Division of M.P.D., however, they deny that they supervised all Intelligence Division informants and officers, and directed or approved all their activities. Defendants Herlihy, Ferguson, and Zink were responsible for the overall-functioning of the Intelligence Division but did not necessarily supervise directly all officers or informants assigned to their Division. (Herlihy, Ferguson, Zink)

Allegation: h. Defendant Zanders was Assistant Chief of Police; he supervised defendant Shoffler and all officers and informants of the Intelligence Division, and directed or approved their activities. (Zanders)

Counter-Response:

Defendant Zanders admits that he was Assistant Chief of Police in charge of the Investigative Services Bureau, of which Intelligence Division was one of five divisions. As such he did not directly supervise the day to day activities of all officers and informants below him in the hierarchy. (Zanders)

Allegation: 1. Defendants Layton and Wilson were, successively, MFD Chief of Police; they supervised all MFD officers and informants and directed or approved their activities.
(Layton; Wilson)

Counter-Response:

Defendants Layton and Wilson admit that they were successively M.P.D. Chief of Police; however, while on duty, they were involved in high-level decisions for M.P.D. and did not directly supervise the day to day activities of police officers and informants. (Layton and Wilson)

Allegation: 2. During the late 1960's and early 1970's defendants conspired to disrupt and counteract plaintiffs' exercise of their constitutional rights of free political association and expression (Exhibits 1, 2 deposition of Kirwin; Documents yet to be produced by D.C. defendants; Winkleman; Campbell).

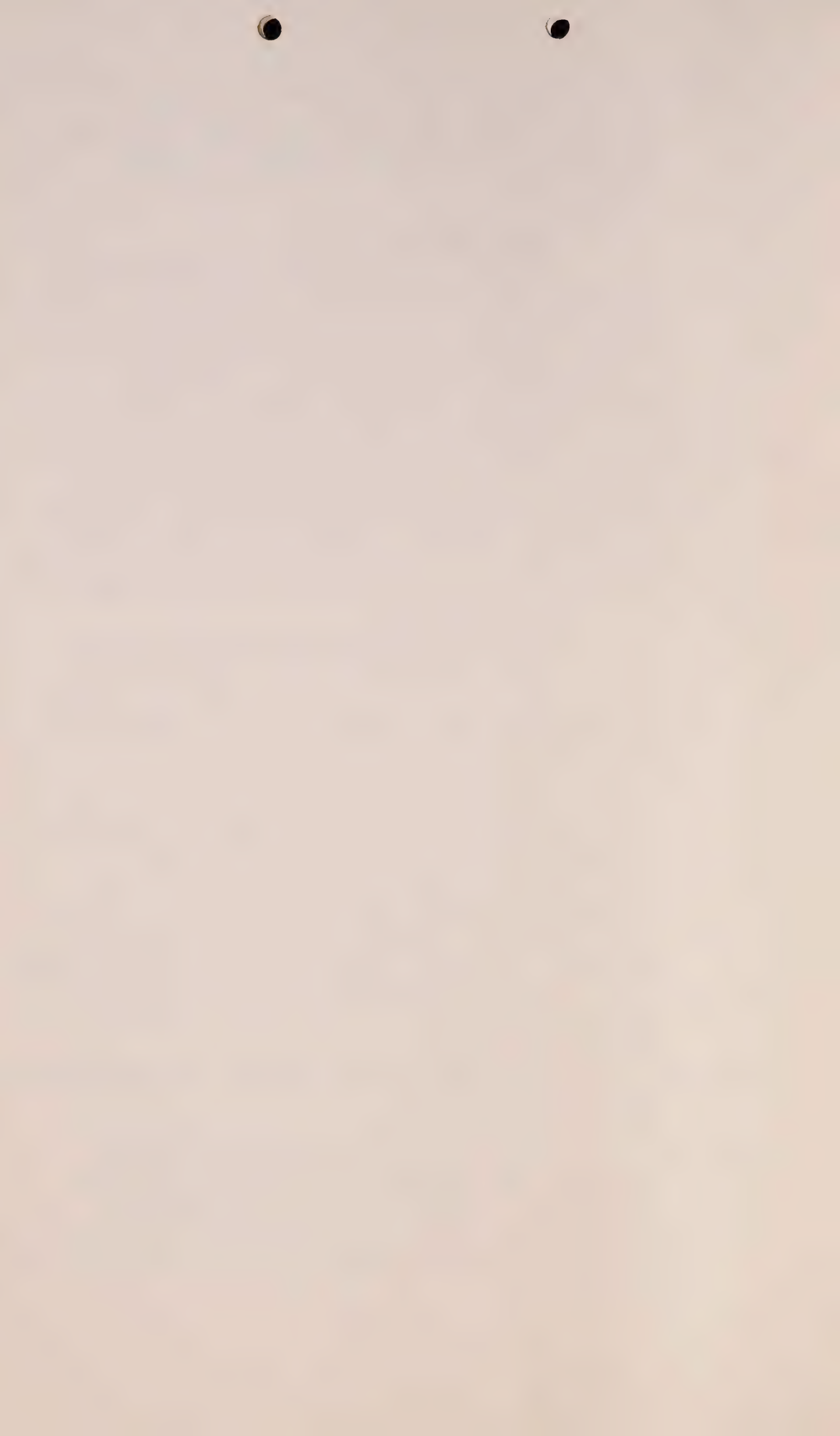
Counter-Response:

District of Columbia defendants deny that during the late 1960's and early 1970's they conspired to disrupt and counteract plaintiffs' exercise of their constitutional rights of free political association and expression.

The Intelligence Division of the M.P.D. during the late 60's and early 70's was responsible for gathering recording and providing of information to appropriate decision-makers regarding upcoming demonstrations which might interfere with the functioning of local and federal governments create civil disobedience or violence; and require a police response. Document General Order 7-6-4(a). (Herlihy, Ferguson, Zink, Wilson)

Allegation: 3. In furtherance of the conspiracy defendants committed the following acts:

Allegation: a. Defendants conducted or directed noncriminal, intelligence investigations of plaintiffs, and for those investigations, directed police undercover officers or informants to infiltrate plaintiffs WSP, WPC, and organizations



in which individual plaintiffs were active or leading members, to seek leadership positions in those organizations, to learn, influence, and report to the Metropolitan Police Department (MPD) the organizations' activities, to report the names of leaders, members or associates of the organization, to report the political ideas expressed and decisions made at private meetings, and to report both the political beliefs and nonpolitical personal activities of plaintiffs. (Exhibits 1, 2, deposition of Kirwin; Exhibits 1, 2, 3, deposition of Suter; Ferguson; Drummod; Kirwin; Documents yet to be produced by D.C. Defendants; Winkleman)

Counter-Response:

District of Columbia defendants conducted non-criminal intelligence investigations of plaintiffs WPC, WPS and ECTC for the purpose of gathering, recording, and providing information to appropriate decision-makers which might inform the MPD of future plans for demonstrations which might result in violence; disruption of federal and local governmental functions; or civil disobedience, in order for M.P.D. to be ready in the event that a police response was required. In order to gather this information it was necessary for the defendants to infiltrate plaintiffs' organizations, by attending public meetings, gathering literature, and in a few instances taking an active role in plaintiffs' organizational structure. Defendants would report back to M.P.D. only information concerning a demonstration, or meeting which might require a police response. The information reported by employees of M.P.D. to the Intelligence Division included names of leaders; size of meetings; plans for future demonstrations and dates, times and locations of the demonstrations. The reports did not include political beliefs or ideas expressed at meetings, nor did they include non-political or personal activities of plaintiffs unless these activities advocated violence and would result in the



necessity for a police response. (Suter, Ferguson, Drummond, Gildon, Fynum, Jagen, Brown, Documents General Order 7-6-4 (a))

Allegation: (1) Defendant Jagen, an undercover officer, infiltrated organizations with which plaintiffs WPC, Ploom, Abbott, Hobson and Waskow were affiliated, and committed the acts stated above. (Jagen; Ploom; Abbott)

Counter - response:

Defendant Jagen was employed by the M.P.D. as an undercover police officer. While on duty, defendant Jagen infiltrated plaintiff WPC for the purpose of gathering recording and providing information on future activities, such as demonstrations which might disrupt federal or local governmental functions, cause civil disobedience or require a police response. It is denied that defendant Jagen violated any of plaintiffs' rights by these activities (Jagen) General Order (7-6-4-a)

Allegation: (2) Defendant Fynum, an undercover officer, infiltrated organizations in which plaintiffs Booker and Abbott were active and committed the acts stated above. (Fynum; Booker; Abbott; Bloom)

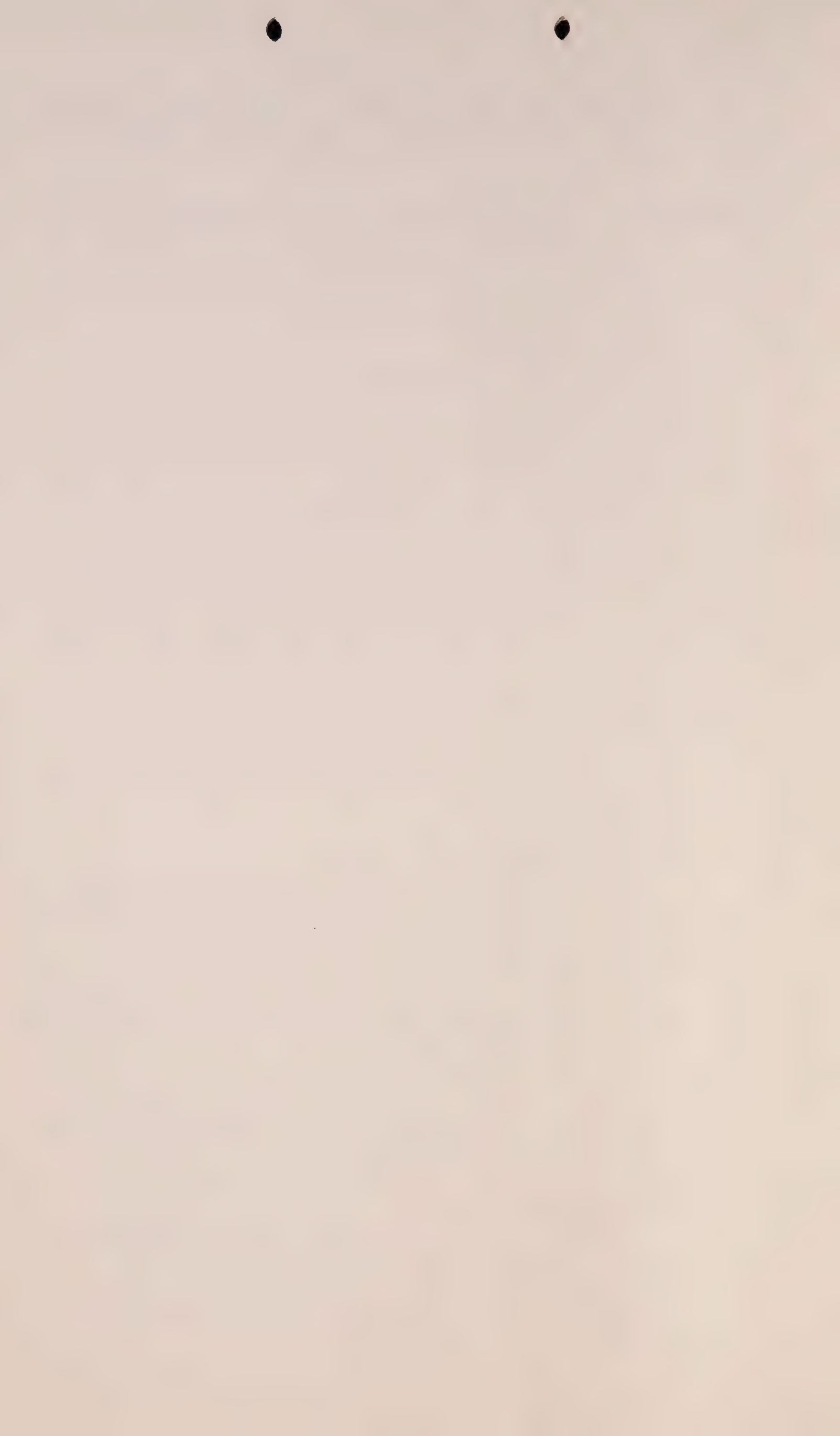
Counter-response:

Defendant Fynum was employed as an undercover officer for the MFD. While on duty defendant Fynum infiltrated the organizations in which plaintiffs Booker and Abbott were active members, by attending both public and private meetings; however, his attendance at a private meetings was by invitation of plaintiff Booker. (Fynum)

Allegation: (3) Defendant Dorie Binsted, an informant, infiltrated organizations in which plaintiff Tina Hobson was active and committed the acts stated above. (D. Binsted; Hobson)

Counter-response:

Defendant Dorie Binsted was not a paid informant employed by MFD, but merely volunteered her services by assisting her husband James Binsted, an undercover police officer.



Defendant Binsted did attend meetings of organizations in which plaintiff Tina Hobson was an active participant. It is denied that defendant P. Binsted violated any of plaintiffs rights by these activities. (Doris Binsted, James Binsted)

Allegation: (4) Defendant Markovich, an informant, infiltrated organizations in which plaintiff Pollock was active and committed the acts stated above. (Pollock; Cullum; Albert; Banks; Gildon; Suter; Scrapper)

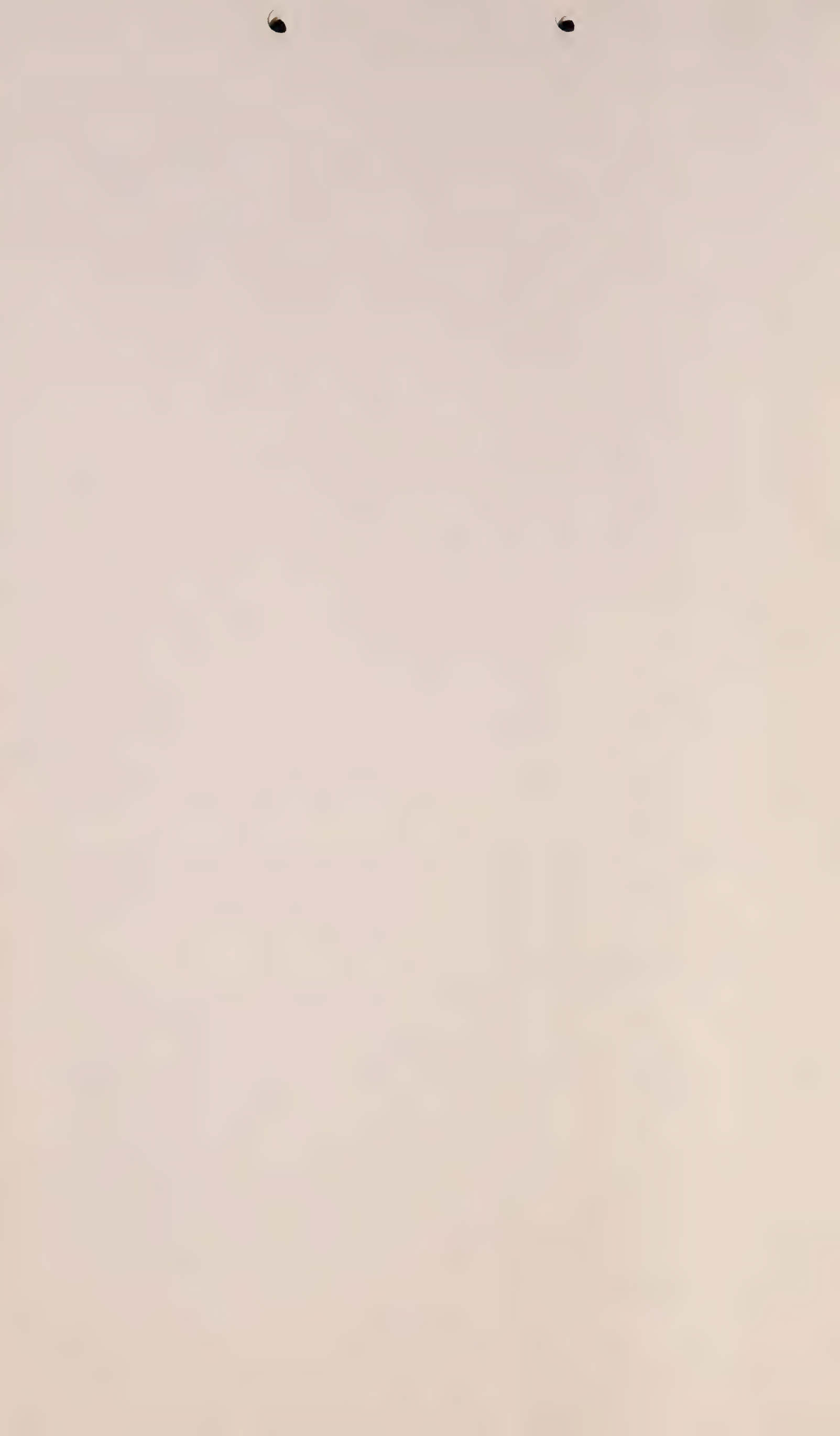
Counter-Response:

Defendant Markovich was an informant working for the M.P.D. and assigned to the Intelligence Division. While on duty, defendant Markovich infiltrated organizations in which plaintiff Pollock was an active member; however, defendant Markovich was attempting to gather record, and provide information which might assist the M.P.D. in preparing for future demonstrations, and/or other activities by these organizations which might require a police response. It is denied that defendant Markovich violated any of plaintiffs rights by these activities. (Markovich, Gildon, Scraper, Suter).

Allegation: (5) The other defendants also conducted or directed investigations of plaintiffs as stated above. (Gildon; Mahaney; Day; Shoffler; Scraper)

Counter-response:

District of Columbia defendants admit that some other police officers and informants employed by M.P.D. infiltrated plaintiffs organizations in order to gather, record and provide information which might assist M.P.D. in preparing for upcoming demonstrations and /or other activities by these organizations which might require a police response because of the potential for violence or disruption of local and/or federal governmental functions: (Suter, Scraper, Day, Mahoney).



Allegation: b. Defendants conducted overboard, non-criminal, intelligence investigations of plaintiffs, using informants and undercover officers and collecting information over a time period far longer than, and to a degree far in excess of, that which could conceivably have been necessary to accomplish any possible, legitimate governmental purpose. (Sources cited under a., supra).

Counter-Response:

Defendants deny that the investigations of plaintiffs, using informants and undercover police officers for collecting, information, were either overboard in excess of, that activity necessary to accomplish a legitimate governmental purpose. This legitimate governmental purpose is outlined in defendant's counter-responses to paragraphs numbered 2 and 3(a) above. General Order 7-6-4(a) (Suter, Ferguson, Wilson).

Allegation: c. Defendant Markovich on several occasions acted as agent provocateur, urging persons to be violent at demonstrations organized or supported by plaintiffs, and on one occasion throwing a tear gas canister at uniformed police. (Pollock; Cullum; Albert; Banks; R. Davis; Drobinair).

Counter-Response:

District of Columbia defendants Markovich denies that she acted on agent provocateur, urging persons to be violent at demonstrations organized or supported by plaintiffs, and denies throwing a tear gas canister at uniformed police. (Markovich).

Allegation: d. Defendants who were Markovich's superiors directed her to act as agent provocateur, or approved her so acting. (J. Binsted; Cullum; Banks; Albert; Francis).

Counter-Response:

District of Columbia defendants deny that defendant Markovich's superiors directed her to act as an agent provocateur. (Markovich, Ferguson, Acree, Scrapper).



Allegation: e. Defendants directed undercover officers or informants to urge persons to confront police violently at a November 6, 1969 demonstration organized or supported by plaintiffs to protest construction of the proposed Three Sisters' Bridge, or defendants approved the undercover officers or informants so acting. (Abbott; Francis, J. Finsted)

Counter-response:

District of Columbia defendants deny that they urged undercover officers or informants to confront police violently on November 6, 1969, in a protest of the proposed Three Sisters' Bridge Construction.

(Suter, Ferguson, Finsted, Gildon, Pynum)

Allegation:f. Defendants directed undercover officers or informants to damage photocopying equipment in offices at 1029 Vermont Avenue, N.W., occupied by organizations in which plaintiffs were active or leading members, or with which they were affiliated; or defendants approved the undercover officers' or informants' so acting. (Spiker; Winkleman; Documents yet to be produced by D.C. defendants)

Counter-Response:

District of Columbia defendants deny that they instructed employees of the M.P.D. officers or informants, to damage photocopying equipment at 1029 Vermont Avenue, N.W. (Binsted, Gildon, Bynum, Jagen).

Allegation: g. Defendants Scrapper, Acree, Suter, and their defendant superiors directed an undercover officer and informant to enter unlawfully a 1029 Vermont Avenue, N.W., office of an organization in which plaintiffs were active or leading members, or with which they were affiliated, and to remove unlawfully from a locked desk a metal box containing stock certificates and letters belonging to an organization; or those defendants and their superiors approved the undercover officers' and informants' so acting. (Marcum; Suter; Winkleman; Campbell; Documents yet to be produced by D.C. defendants)

Counter-Response:

District of Columbia defendants admit that an undercover police officer entered 1029 Vermont Avenue, N.W. and removed from a desk a metal box containing unidentified stock certificates and other documents or photographs. However, to the defendants' knowledge, no office of a plaintiff in this lawsuit was entered and no property belonging to a plaintiff of this lawsuit was taken. It is denied that District of Columbia defendants violated any of plaintiff's rights or activities as alleged above in paragraph numbered 3g. (Suter)



Allegation: h. Defendants Scrapper, Acree, Suter, and their defendant superiors directed or approved the delivery of the stock certificates and letters to defendant Grimaldi. (Marcum; Winkleman; Campbell)

Counter-Response:

Defendant Suter does not recollect what was done with the contents of the metal box which was taken from 1029 Vermont Avenue, N.W. However, it is denied that the defendants Scrapper, Acree and Suter and their defendant superiors violated any of plaintiffs' rights. (Suter, Scrapper).

Allegation: i. Defendants Scrapper, Acree, Suter, and their defendant superiors directed or approved the installation of electronic listening devices in informants homes and directed, approved, or participated in the electronic monitoring of meeting held in those homes by organizations in which plaintiffs were active or leading members. (Marcum; Winkleman; Zelloe; Suter; Campbell; Documents yet to be produced by D.C. defendants; Exhibit 30, attached)

Counter-Response:

The District of Columbia defendants admit that electronic listening devices were installed in premises occupied by certain informants ^{with their consent,} but deny any knowledge of monitoring the conversations of plaintiffs from these listening devices. (Suter, Zelloe, Robinson)

Allegation: 4. Defendants knew the FBI defendants were involved in similar efforts to disrupt and counteract plaintiffs' exercise of their constitutional rights; defendants shared with the FBI defendants information concerning their similar efforts and acted in concert with them. (Sources cited under A.4, supra.)

Counter-Response:

District of Columbia defendants deny that they knew of

any efforts by the FBI defendants to disrupt plaintiff's exercise of their constitutional rights. The defendants shared knowledge with the FBI in order to enable the federal government to deal appropriately with upcoming demonstrations and civil disobedience so as to protect the safety of citizens of District of Columbia and the United States. (Wilson, Ferguson, Suter, General Order 7-6-4).

C. Against All Defendants:

Plaintiffs propose to prove at trial the following facts against all defendants:

Allegation: 1. As a result of defendants' investigation, disruption, and counteraction of plaintiffs' exercise of constitutional rights plaintiffs were hindered and delayed in the accomplishment of their political goals, precluded from associating with those deterred by defendants from engaging in political activity, required to spend time and effort overcoming defendants' disruption and counter-action, and denied unfettered enjoyment of their constitutional liberties. (Report, White House Conference on Youth (1970); Doe; Donner; Borosage; Gurewitz; Bloom; Washow; Hobson; Eaton; Abbott; Pollock; Kaufman; Villistrigo; Booker).

Counter-Response:

District of Columbia defendants deny that their gathering of information and other activities hindered and delayed plaintiffs in the accomplishment of their political goals. Precluded from associating with those deterred by defendants from engaging in political activity, required to spend time and effort overcoming defendants' disruption and counter-action, and denied unfettered enjoyment of their constitutional liberties. (Wilson, Ferguson).

Allegation: 2. As a result of defendants' investigation, disruption, and counteraction of plaintiffs' exercise of constitutional rights plaintiffs suffered stress and other mental and emotional harm. (Levin; Bloom; Waskow; Hobson; Eaton; Abbott; Pollock; Booker).



Counter-Response:

District of Columbia defendants deny that the actions of their employees impinged or disrupted plaintiffs' exercise of their constitutional rights and further deny that plaintiffs suffered any stress or other emotional harm as a result of the actions of defendants employees. (Bynum, Jagen, Gildon, Einsted).

III. Legal Contentions

A. A civil conspiracy is not in itself actionable. Rather, a cause of action arises only if there is a conspiracy to do an unlawful act or to do something in an unlawful manner and an overt act is taken which injures the plaintiffs Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974); Edwards v. James Stewart & Co. 82 U.S. App. D. C. 123, 160 F. 2d 935 (1947)*.

B. Penetration of organizations by law enforcement agents or use of informants of undercover agents whether covert or overt does not violate the 4th Amendment. Berlin Democratic Club v. Rumsfield, 410 F. Supp. 144 (D. C.D.C. 1976)*; Louis v. United States, 385 U.S. 206 87 S. Ct. 424 17 L.Ed. 2d 312 (1966)*; Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966).

C. Intelligence gathering operations do not inhabit 1st Amendment rights absent an existent or imminently threatened governmental sanction such as criminal prosecution. Finley v. Hampton, 154 U.S. App. D.C. 50, 473 F. 2d 180 (1972)*; Davis v. Ichard, 143 U.S. App. D.C., 183, 442 F 2d 1207 (1970) Laird v. Tatum, 408 U. S. 1, 92 S. Ct. 2318 33 L. Ed. 2d 154 (1972)*.

D. The District of Columbia is not subject to the provision of 42 U.S.C. §1985(3). District of Columbia v. Carter, 409 U.S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973)*

E. Plaintiffs have not stated a cause of action under 42 U.S.C. §1983 Griffin v. Breckinridge, 403 U.S. 88, 91 S Ct. 1790, 29 L.Ed. 2d 338 1971); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977)* Orshan v. Anker, 489 F. Supp. 820 (D.C. N.Y. 1980)*.

F. Plaintiffs have not stated a cause of action under 18 U.S.S. 2520 or D.C. Code §23-554 (1973). See 18 U.S.C. 2511(2)(c); United States v. Bryant, 142 U.S. App. D.C. 132, 439 F. Supp. 642*, United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 38 L.Ed. 2d 453 (1971); Lopez v. United States, 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963).

G. The District of Columbia agents enjoy a qualified immunity. Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 6213 18 L. Ed. 2d 288 (1967)*; Procunier v. Navarette 434 U.S. 555, 98 S. Ct. 855 55L. Ed. 24 (1978).

H. The District of Columbia cannot be held liable under the theory of respondeat superior. Morel v. N. Y.C. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*; Rizzo v. Goode, 423 U.S. 362, 96 S. Ct. 598 46 L. Ed. 2d 561 (1976).

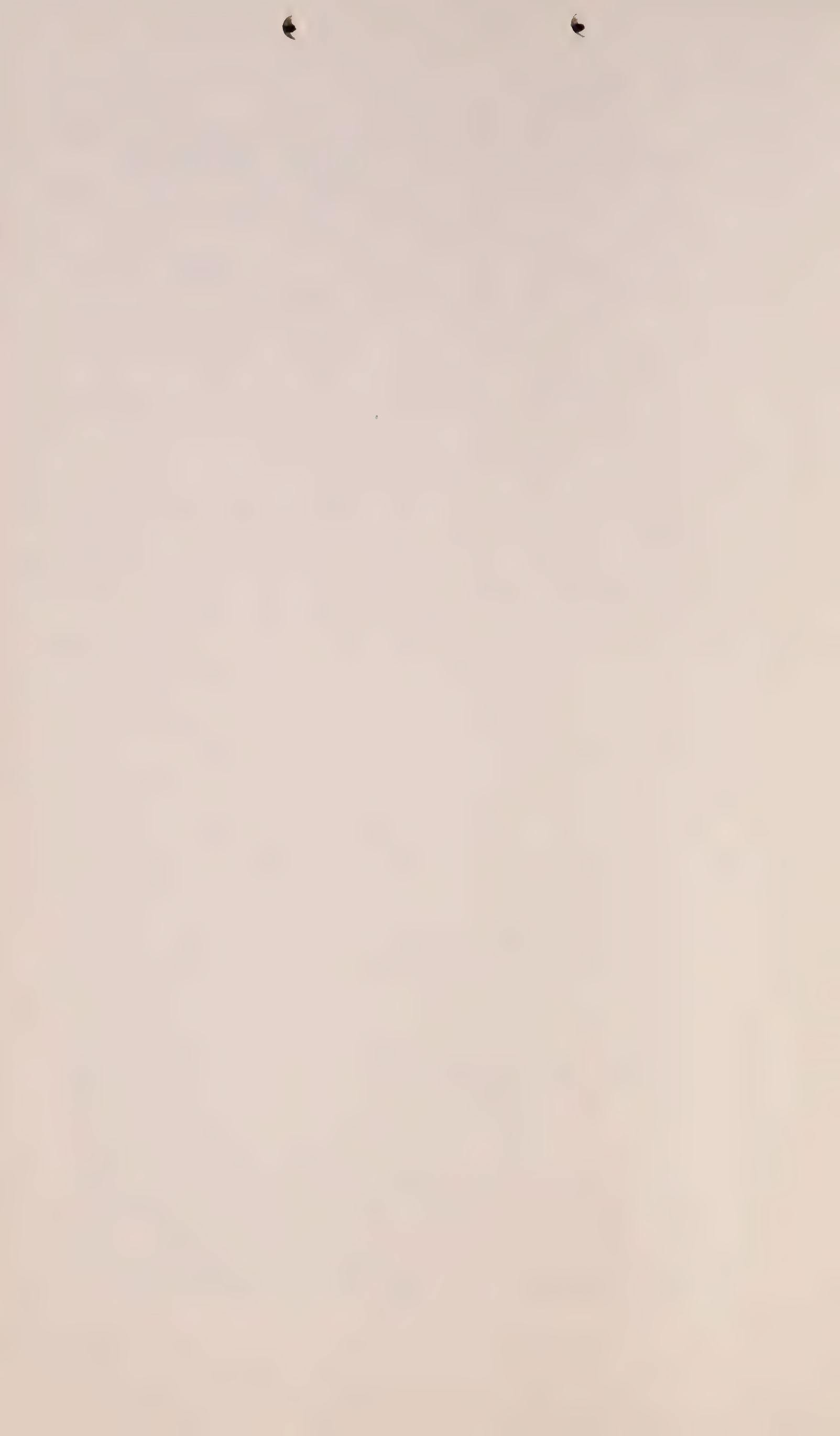
I. Plaintiffs claims are barred by the applicable statute of limitations. Fitzgerald v. Seamans, 180 U.S. App. D. C. 75, 553 F. Supp. 2d 220 (1977)*; Smith v. Nixon, 196, U.S. App. D.C. 276, 606 F. 2d 1183 (1979). See also Lee v. Kelly, D.D.C. Civil Action No. 76-1185, decided January 1977.

J. Defendants are not liable for punitive damages absent actual malice or wanton and/or reckless disregard for the rights of others. Smith v. District of Columbia, 336 A. 2d 831 (D.C. 1975)*.

IV. Argument

Plaintiffs allege the existence of a conspiracy between the federal defendants and the District defendants to deprive them of their constitutional rights and seek to hold the District defendants liable under 42 U.S.C. §1985(3). For the reasons that follow the District defendants are not amenable to suit under 42 U.S.C. §1985(3).

42 U.S.C. §1985(3), like 42 U.S.C. §1983, derives from the Civil Rights Act of 1871, 17 Stat. 13, entitled, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." The 1871 Act was popularly known as the "Ku Klux Klan Act," and, like the amendment upon which it is based, has only limited scope and application. In District of Columbia v. Carter, 409 U.S. 418, 93 S. Ct. 602, 34 L.Ed. 2d 613 (1973), the Supreme Court held that Congress, in enacting the KKK Act of 1871, did not intend to include the District of Columbia within the meaning of the words "state or territory" as used in the statute. Thus, actions taken by officials under color of District of Columbia law cannot subject the District of Columbia defendants to liability under 42 U.S.C. §1985(3). District of Columbia v. Carter, *supra*, 409 U.S. at 424. Even if, arguendo, the District defendants were amenable to suit under 42 U.S.C. §1985(3), plaintiffs' allegations would still fail to state a claim against the District defendants. Plaintiffs cannot prove a racial or perhaps otherwise class based invidiously discriminatory animus as is required under that statute. See Griffin v. Breckinridge, 403 U.S. 88, 91 S.Ct. 1799, 29 L.Ed. 2d 338 (1971); Orshan v. Anker, 489 F. Supp. 820 (D.C. N.Y. 1980). The language of § 1985 has been interpreted to require discrimination between classes based on racial bias, national origin or religion, the class being well defined and a traditionally disadvantaged group. Santiago v. City of Philadelphia, 435 F. Supp. 136, 156 (E.D. Pa. 1977).



Although plaintiffs, as a group of antiwar protesters may have shared certain common political beliefs and may have been the object of law enforcement interest because of their potentially disruptive antiwar activities, these characteristics do not qualify them as a class within the meaning of §1985.

Moreover, even if there had been a conspiracy to violate plaintiffs rights, it is well settled that a civil conspiracy is not in itself actionable; rather it is the acts undertaken in furtherance of the conspiracy which gave rise to the cause of action. Fitzgerald v. Seamans, 384 F. Supp. 688 (D.C.D.C. 1974); affirmed in relevant part, 180 U.S. App. D.C. 75, 553 F.2d 220; Edwards v. James Stewart & Co., 82 US. App. D.C. 123, 160 F.2d 935 (1947). In this regard there is no evidence that the District of Columbia defendants conspired to violate these plaintiffs rights, or took any overt action to do so.

Plaintiffs allege that the intelligence gathering operation of the District defendants violated their constitutionally protected rights of privacy and association. The mere penetration of plaintiffs' organizations by law enforcement agents, whether covert or overt, does not violate the Fourth Amendment. Berlin Democratic Club v. Rumsfield, 410 F. Supp. 144 (D.C.D.C. 1976). See also Lewis v. U.S., 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed. 2d 312 (1966). Hoffa v. U.S. 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374 (1966). Likewise no constitutional violation is occasioned by the presence of law enforcement agents at public rallies or meetings.

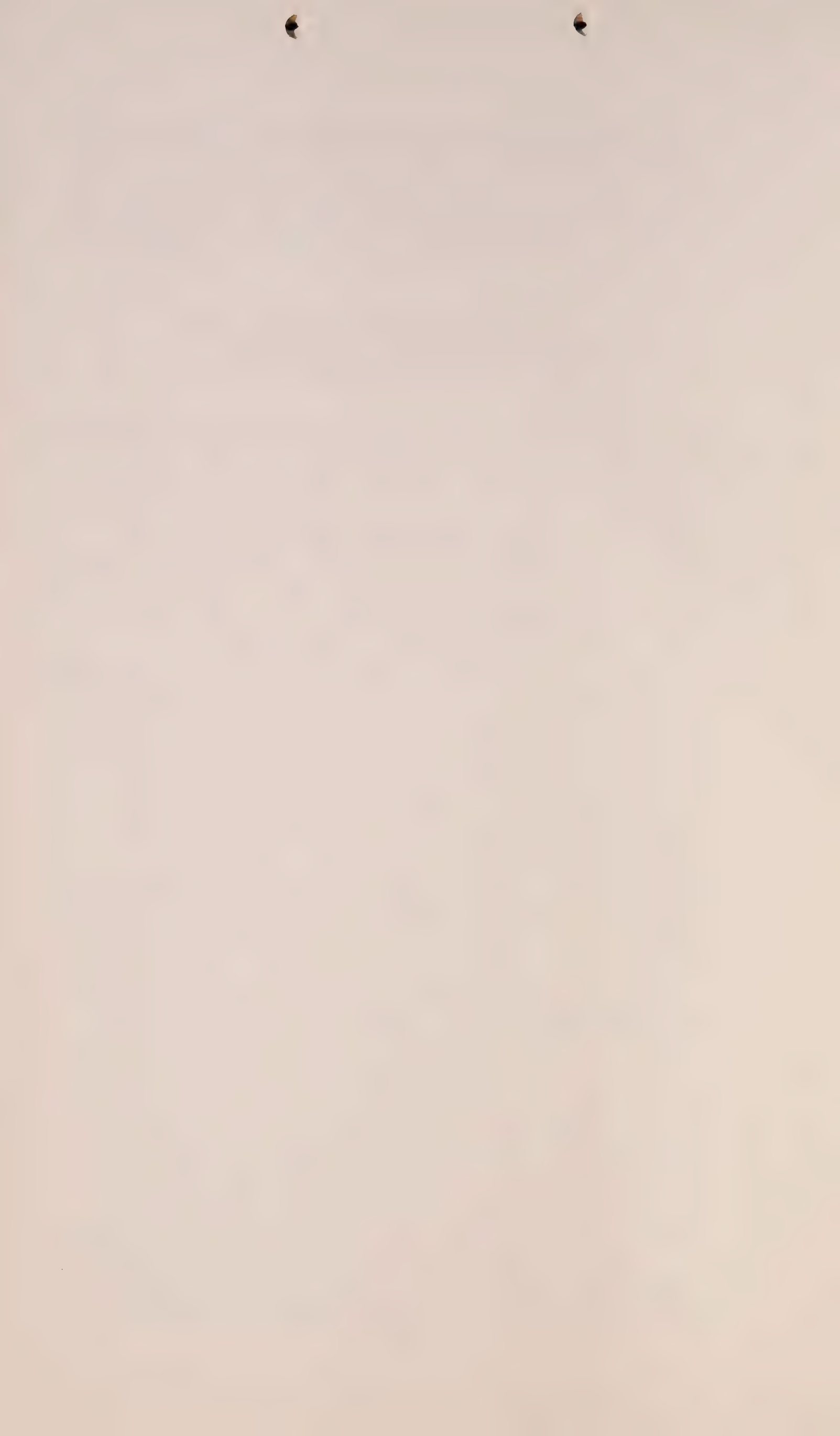
Similarly intelligence gathering operations do not inhibit First Amendment rights absent an existant or imminently threatened governmental sanction. Finley v. Hampton, 154 U.S. App. D.C. 50 (1972), 473 F.2d 180; Laird v. Tatum, 408 U.S., 91 S.Ct. 2318, 33 L.Ed. 2d 154 (1972). Plaintiffs

allege that the intelligence operations were designed to gather information to counteract or disrupt their activities. In essence they claim a chilling effect upon their exercise of their rights of freedom of association. As stated in Laird v. Tatum, supra, at 13-14.

"Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."

Examples of the type or degree of actions and sanctions that would give rise to a claim appear in N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S. Ct. 1163 2 L. Ed. 2d 1488 (1958) (contempt citation); Dombroski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965) (criminal prosecution); National Student Assoc. v. Hershey, 134 U.S. App. D.C. 56, 412 F. 2d 1103 (1969) (threat of conscription).

Nor do the electronic surveillance operations complained of give rise to a 42 U.S.C. 2520 or D.C. Code §23-554 cause of action. Under 18 U.S.C. 2511(2)(c) it is not unlawful for persons acting under color of law to intercept wire or oral communications where one of the parties to the communication has given prior consent. See also U.S. v. Bryant, 142 U.S. App. D.C. 132, 438 F. 2d 642; Lopez v. U.S., 373 U.S. 427, 83 S. Ct. 1381 10 L. Ed. 2d 462 (1963); U.S. v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed 2d 453 (1971). Where the person consenting or a party to the conversation is an informant and the government provides the equipment and does the monitoring, the informant is acting under color of law within the meaning of 18 U.S.C. §2511(2)(c). See U.S. v. Bryant; U.S. v. Craig, 573 F. 2d 855 (111. 1977). Accordingly, the electronic surveillance of certain of the plaintiffs where one of the parties was a consenting informant does not give rise to a claim under 42 U.S.C. §2520. Further, under the circumstances of this case, defendants have available a good faith reliance on legislative



authorization which constitutes a complete defense. See 42 U.S.C. 2520 and D. C. Code 23-554.

The District defendants, particularly those individual officers named as defendant, enjoy a qualified immunity if at the time of their alleged conduct they had a reasonable and good faith belief that their conduct was lawful.

Proconier v. Mavarette, 434 U.S. 555, 98 S. Ct. 855 (1978) Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213 (1967). Said immunity constitutes a complete defense even if their conduct is later found to be unlawful. Pierson, supra, at p. 357.

Accordingly, if the District defendants in carrying out their duties, reasonably and in good faith believed that their conduct was lawful they are immune from liability.

The District of Columbia cannot be held liable under the theory of respondeat superior unless the alleged injury was inflicted as a result of governmental policy or custom, that is, said conduct must be found to represent official policy. Monel v. N.Y.C. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978). Thus the District of Columbia cannot be held liable for a constitutional tort, merely because it employs the tortfeasor.

Plaintiff's claims are barred by the statute of limitations. Because there is no federal statute of limitations in this type of action, it has been held that the limitation period specified in local law for the most closely analogous common law tort will establish the limitation for the Constitutional torts. In this case, the general 3 year limitation provided in D. C. Code §12-301(8) governs Loguirato v. Action, 490 F. Supp. 84 (D.D.C 1980). Further, the three year period begins to run on the date of the injury. See Sheyn v. District of Columbia, ____ U.S. App. D.C. ____, 392 A 2d 1008 (1978). Here, suit was filed on July 16, 1976, while the torts were allegedly



committed well before July 16, 1973. Since many of the incidents were topics of newspaper accounts and plaintiff could have discovered the basis of the lawsuit in the exercise of due diligence, the statute was not tolled. Moreover, in a number of instances, plaintiffs were actually aware that they were the subjects of police investigations more than three years before filing suit. See Lee v. Kelly, D.D. C. (Civil Action No. 76-1185, decided January, 1977) Accordingly, plaintiffs action is barred by the applicable statute of limitation. See Smith v. Nixon, 196 U.S. App. D.C. 276, 606 F. 2d 1183 (1979); Fitzgerald v. Seamans, 180 U.S. App. D.C. 75, 553 F. 2d 220 (1977).

Judith W. Rogers
JUDITH W. ROGERS,
Corporation Counsel, D. C.

John H. Suda
JOHN H. SUDA,
Deputy Corporation Counsel, D. C.

Laura W. Bonn
LAURA W. BONN, [951327]

GEORGE N. BARCLAY [248849]
Assistant Corporation Counsel, D.C.
Attorneys for Defendants
District Building
Washington, D. C. 20004
727-6348

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Pre-trial Brief of Defendants District of Columbia was mailed, postage prepaid, to Daniel M. Schember, Esq., Attorney for Plaintiffs, 1712 N Street, N. W., Washington, D. C. 20036; and David White, Esq., Attorney for Federal Defendants, Department of Justice, Washington, D. C. 20530, this day of November, 1981.

Assistant Corporation Counsel, DC
Attorney for Defendants
District Building, Rm. 324
Washington, D. C. 20004
727-6348

Pre-Trial Order on FBI
As Motions for Judgment
on Pleadings

inc. ruling on Jones
late service

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,

Plaintiffs,

v.

JERRY WILSON, et al.,

Defendants.

:
:
:
:
:
:
:
:
:
:

Civil Action No. 76-1326

✓**FILED**

OCT 29 1981

MEMORANDUM AND ORDER

JAMES E. DAVEY, CLERK

Plaintiffs brought this action for damages and injunctive relief against a number of federal and District of Columbia law enforcement officials who, according to the amended complaint, systematically violated plaintiffs' civil rights while plaintiffs participated in lawful protest during the 1960's and 1970's against United States involvement in the Viet Nam War. With pretrial discovery nearly complete, the federal defendants have moved variously for dismissal of the complaint under Rule 8, Fed. R. Civ. P., and for judgment on the pleadings. All the federal defendants assert that the action is barred by a three-year statute of limitations. In addition, defendant Jones seeks dismissal of the complaint as to him because of allegedly excessive delay in effecting service of process. He and defendant Pangburn also seek dismissal for failure of plaintiffs to state the basis of plaintiffs' claim against them for their individual conduct. A number of other defendants had raised defenses similar to those of Jones and Pangburn and, as to those others, plaintiffs have sought leave for voluntary dismissal of the action. The District of Columbia, also a defendant in this action, appears not to participate in any of the present motions.

The grounds of the federal defendants' motions are substantially identical to those considered by Judge Pratt, to whom this case had been assigned earlier in its history. See Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., Nov. 9, 1979). In a memorandum of November 9, 1979, Judge Pratt refused to dismiss the complaint for failure to meet the standards of Rule 8, Fed. R. Civ. P. He also determined that, although a three-year

statute of limitations would apply to plaintiffs' claims, see D.C. Code § 301(8), the action should not be dismissed, because plaintiffs had suggested that defendants had fraudulently concealed information that would have made them aware of their rights of action during the three-year period after time began to run on their rights. Without making specific findings about those allegations of fraudulent concealment, the Court indicated that plaintiffs might well have lacked the "material facts" necessary for "intelligent prosecution" of their rights. See Emmet v. Eastern Dispensary & Casualty Hospital, supra, 130 U.S. App. D.C. 50, 56, 396 F.2d 931, 937; Hobson v. Wilson, supra, slip op. at 6. The Court stated, however, that defendants should have an opportunity to renew their motion for judgment on the pleadings later in the litigation if it subsequently appeared that plaintiffs had failed to prosecute their action without good cause.

In support of their present motion based on the statute of limitations, defendants argue that it is the law of this case that the longest statute of limitations applicable to the action is the three-year period established by 12 D.C. Code § 301(8). Defendants assert that because the complaint (later amended) that commenced this action was filed on July 16, 1976, and because no act is specifically alleged to have occurred after that date, the case should be dismissed. Plaintiffs, in their opposition to the defendants' motion, appear to concede that they allege no act giving rise to a cause of action after July 16, 1973. They argue, however, that the three-year statute of limitations should not apply to their constitutional cause of action against defendants, and that even if it did apply, the defendants concealed material facts that would have enabled them earlier to commence the action. Plaintiffs thus ask the Court to revise the decision of November 9, 1979, concerning the applicability of the statute of limitations and, in the alternative, to invoke the equitable doctrine of fraudulent or deliberate concealment. The developments in the law governing use of local procedure rules in direct constitutional actions since this Court's decision in November 1979, perhaps highlighted by Carlson v. Green, 446 U.S. 14



(1980), do not, however, permit the Court to reconsider the 1979 decision that 12 D.C. Code § 301(8) applies to this case. Certainly, Carlson v. Green is not itself authority, as plaintiffs argue, for avoiding local statutes of limitation in direct constitutional actions. The issue thus becomes whether the Court should, upon examination of the present record, find that plaintiffs are entitled to the benefit of the equitable doctrine the Court applied pro tempore in November 1979.

Plaintiffs bear the burden of proving their right to toll the statute of limitations because of alleged fraudulent or deliberate concealment. Emmett v. Eastern Dispensary & Casualty Hospital, supra, 130 U.S. App. D.C. at 56-57, 396 F.2d at 938-39. Our Court of Appeals has established principles governing the application of that doctrine to public actions involving allegations of covert official wrongdoing. See, e.g., Smith v. Nixon, 196 U.S. App. D.C. 276, 606 F.2d 1183 (1979); Fitzgerald v. Seamans, 180 U.S. App. D.C. 75, 553 F.2d 220 (1977). It is unclear from the record in this case whether Judge Pratt's November 1979 ruling on the motion to dismiss dealt with the depositions of plaintiffs Tina Hobson and David Eaton concerning their knowledge of official misconduct directed at them during the 1960's and 1970's. See Eaton deposition at 14-15 (filed Dec. 12, 1978); T. Hobson deposition at 9-11 (filed Jan. 17, 1979). Similarly, it is unclear whether Judge Pratt had before him in 1979 the magazine and newspaper articles the government now offers as evidence that plaintiffs might, through "due diligence," see Fitzgerald v. Seamans, supra, 180 U.S. App. D.C. at 83, 553 F.2d at 228, have discovered the facts that could have been the basis of a claim well before the statute had run. Even if this Court should deem all those materials to have been before the Court in November 1979, however, it is clear that Judge Pratt did intend his decision to preclude a motion to dismiss turning on the applicability of the doctrine of fraudulent or deliberate concealment, after fuller development of the facts and issues in pretrial proceedings. See Hobson v. Wilson, supra, slip op. at 6.



Pretrial is now virtually complete. The eve of trial is the appropriate moment in this case to resolve the facts on the fraudulent concealment question. See Fitzgerald v. Seamans, supra, 180 U.S. App. D.C. at 84, 553 F.2d at 229. While plaintiffs must prove their entitlement to equitable relief from the statute of limitations, the decision in Fitzgerald v. Seamans, supra, appears to contemplate an opportunity for the taking of evidence on the issues of "due diligence" and prior knowledge of a right of action before summary judgment, or judgment on the pleadings, could be granted in a case like the present one. See id.; see also Smith v. Nixon, supra, 196 U.S. App. D.C. at 283, 606 F.2d at 1190. This Court cannot say that the plaintiffs have now proven an entitlement to relief from the statute of limitations; but similarly, there remain material questions about the ability of plaintiffs to have commenced action prior to the issuance of the report of the Ninety-Fourth Congress' Senate Select Committee To Study Governmental Operations With Respect To Intelligence Activities in 1976. While the references to the Hobson and Eaton depositions raise unresolved questions about plaintiffs' knowledge of their rights of action, plaintiffs must have adequate opportunity to carry the burden that the doctrine of fraudulent or deliberate concealment imposes on them.

An accompanying order therefore directs the parties to file papers to assist the Court in determining whether it can, on the basis of the present record, reach and decide the issues raised by plaintiffs' claim of fraudulent or deliberate concealment, particularly in light of Fitzgerald v. Seamans, supra, 180 U.S. App. D.C. at 84, 553 F.2d at 229. In addition to assembling all the present evidence pertinent to plaintiffs' claim, the papers should discuss whether the knowledge plaintiffs did have of official misconduct bars some, if not all, of their substantive claims, and whether that knowledge placed them under an obligation to investigate sua sponte what they knew, or suspected, about government interference with their activities. See Smith v. Nixon, supra, 196 U.S. App. D.C. at 284, 606 F.2d at 1191. The parties should also discuss whether a plaintiff's

knowledge, or the obligations of "due diligence" attributable to one plaintiff, should affect the entitlement of other plaintiffs to go forward even if the knowledgeable plaintiff must be dismissed from the action. Moreover, the parties should address the difficult questions raised if it appears that the plaintiffs had some knowledge of wrongdoing, but no knowledge of the particular individuals, or specific governmental organizations that were responsible for it. See Fitzgerald v. Seamans, supra. Finally, the parties should discuss whether, if the present record does not permit resolution of this matter, the remaining factual issues deriving from the claim of fraudulent or deliberate concealment should be determined by the Court or by a jury. In the event factual questions remain, the Court will wish to try them before or as the first phase of trial on the merits, either to the Court or to a jury. The briefing schedule established by the accompanying Order will permit the Court to examine plaintiffs' claim to the benefit of the doctrine of fraudulent or deliberate concealment at the time of the pretrial conference.

The discrete defenses raised by defendants Jones and Pangburn are more simply resolved. Neither defendant is entitled to dismissal of the complaint as to him for failure to state adequately the claim against him. Such a defense has already been considered and rejected by the Court in its November 1979 decision. See Hobson v. Wilson, supra, slip op. at 3-4. Jones' suggestion that the claims against him should be dismissed for failure to serve process in a timely fashion must also be rejected, inasmuch as he will suffer no prejudice if plaintiffs are precluded from raising any claim against him not stemming from acts already involved in the litigation against other defendants who are represented by Jones' counsel, and who were with Jones in the Federal Bureau of Investigation at the time of his allegedly unlawful conduct. Counsel for Jones is invited to submit with his pretrial brief an appropriate order concerning the claims to be precluded.

Accordingly, it is this 29th day of October 1981 hereby
ORDERED: That the motions to dismiss filed by defen-



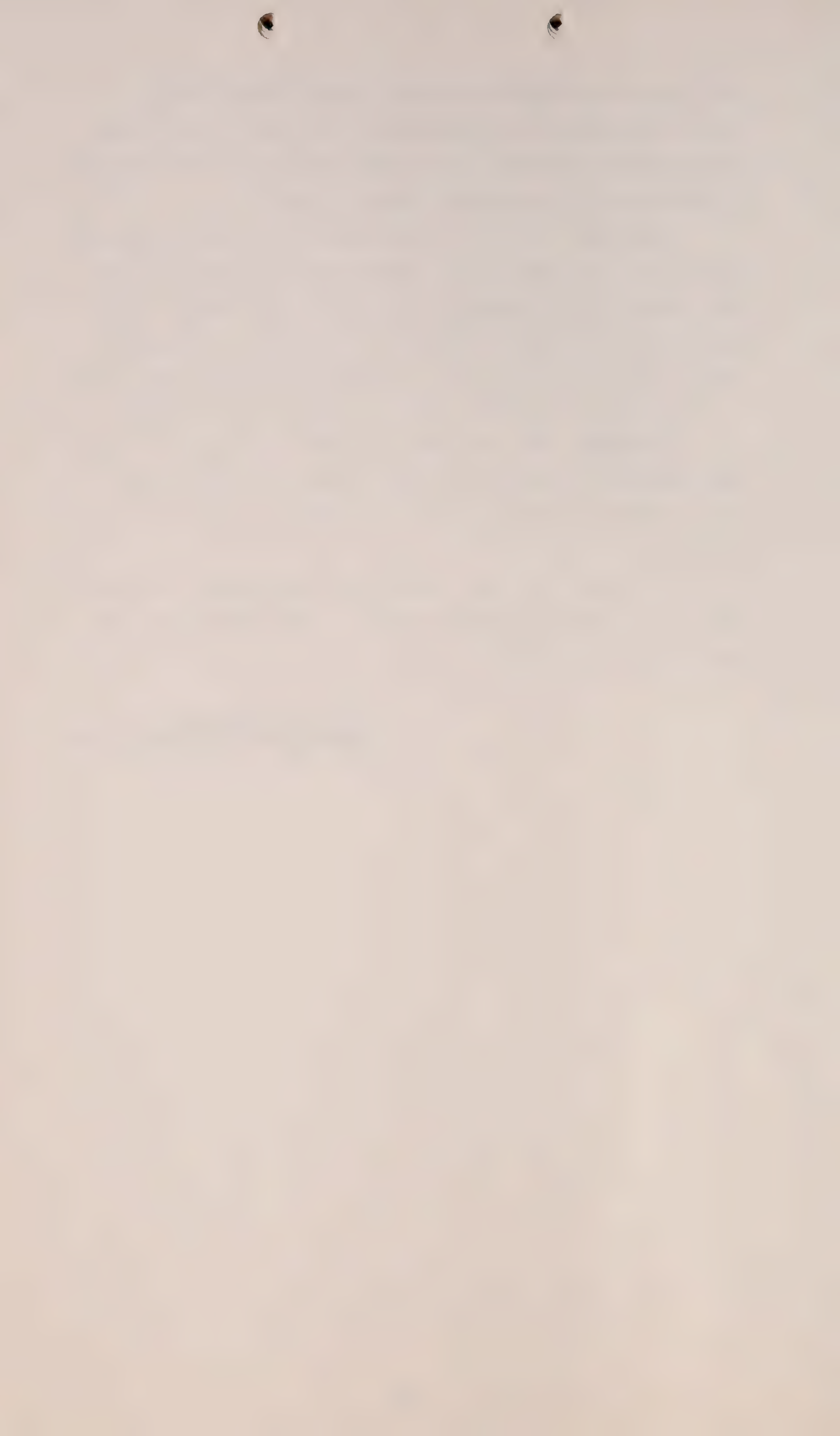
dants Jones and Pangburn are denied, except insofar as the motions seek dismissal or judgment on the pleadings for failure of plaintiffs to commence action within the time period required by the statute of limitations; and it is further

ORDERED: That on or before November 5, 1981, plaintiffs shall file a memorandum, to be accompanied by exhibits if necessary, indicating the basis of their claim to the benefit of the doctrine of fraudulent or deliberate concealment in the present record, and their position as to whether any factual issue raised is for decision by the Court or by a jury; and it is further

ORDERED: That defendant shall file a response to plaintiff's memorandum within seven days of the time of plaintiffs' filing, and in no event later than November 12, 1981; and it is further

ORDERED: That any evidentiary hearing required to resolve any disputed questions of fact will commence November 23, 1981, either with or without a jury.


UNITED STATES DISTRICT JUDGE



FBI Pre-Trial Brief

+
Jury Insti

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,

Plaintiffs,

v.

JERRY WILSON, et al.,

Defendants.

RECEIVED NOV 9 1981

Civil Action
No. 76-1326

PRETRIAL BRIEF OF FEDERAL DEFENDANTS

I. List of Witnesses

The federal defendants may call the following witnesses at trial:

1. All parties.

2. All persons listed as witnesses in plaintiffs' pretrial brief or called by plaintiffs at trial.

3. Robert L. Keuch will testify about the Federal Bureau of Investigation's domestic intelligence jurisdiction and investigative processes and techniques, including electronic surveillance. (2 hours)

4. Hilmer Krebs will testify about the activities of plaintiff Reginald Booker and about his investigation of plaintiff Booker. (1 1/2 hours)

5. Robert Finzel will authenticate Federal Bureau of Investigation documents and will also testify regarding the FBI's investigations of New Left activities. (2 hours)

6. John N. Mitchell will testify regarding the procedures for authorization of national security electronic surveillances in 1969 to 1972. (1 hour)

7. Bernard A. Wells will testify regarding COINTELPRO. (1 1/2 hours)

8. William N. Preusse will testify regarding FBI domestic intelligence investigations. (1 hour)

9. Charles Sawyer will testify about domestic intelligence investigations. (1 hour)



10. James F. Whalen will testify about domestic intelligence investigations. (1 hour)

11. John Stanley will testify about domestic intelligence investigations. (1 hour)

12. Terry O'Connor will testify about domestic intelligence investigations. (1 hour)

13. William T. Tucker will testify about domestic intelligence investigations. (1 hour)

14. Robert F. Olmert will testify about domestic intelligence investigations. (1 hour)

15. Mitchell Rogovin will testify about his knowledge of Robert Merritt's allegations. (1/2 hour)

II. Statement of Facts To Be Proven

1. Each plaintiff engaged in activities protected by the First Amendment to the Constitution of the United States, and no plaintiff was ever deterred from engaging in such activity or was punished for engaging in such activity due to the actions of any of the federal defendants. (All plaintiffs, Brennan, Moore, Grimaldi, Pangburn, Jones)

2. Defendants Brennan, Moore, Grimaldi, Jones, and Pangburn were not personally involved in the investigation of any plaintiff. (Brennan, Moore, Grimaldi, Jones, and Pangburn)

3. Each plaintiff who was investigated by the Federal Bureau of Investigation was engaged in activity which warranted and justified investigation. (All plaintiffs, Hilmer Krebs, excerpts of files pertaining to plaintiffs Abbott, Bloom, Booker, Eaton, Waskow, Pollock, Washington Peace Center, and Washington Area Women Strike for Peace)

4. Prior to July, 1973, information was available to each plaintiff which was sufficient to cause the plaintiff to believe he, she, or the organization had a potential cause of action against agents of the Federal Bureau of Investigation. (All plaintiffs, Exhibits attached to Motion by Federal Defendants for Judgment on the Pleadings, Exhibits attached to Motion by Defendant Terry O'Connor for Judgment on the Pleadings,

Depositions of plaintiffs as follows: Booker at 13, 32-34, 41, 43, 49, 58; Bloom at 16, 20, 28, 31-32, 37-38; Eaton at 17-18, 22; Waskow at 26; Pollock at 9, 10, 38; Abbott at 6, 10-11, 25, 28-31; Villastrigo (Woman Strike for Peace) at 50-56, 66-68.

5.a. In January, February, and March of 1972, articles by or about Robert Wall, former Special Agent of the Federal Bureau of Investigation, were published in The Washington Post, The Washington Star, The New York Times, and The New York Review of Books.

b. Each individual plaintiff and persons associated with each organizational plaintiff were aware of some or all of these articles or were aware of the disclosures made by Robert Wall relating to his activities in the FBI.

c. Plaintiff Arthur Waskow was personally acquainted with Robert Wall in 1971 and 1972 and talked with him regarding his activities in the FBI.

d. The disclosures made by Robert Wall in 1971 and 1972 were relied on by plaintiffs in commencing this civil action. (All plaintiffs, Exhibits to Motion by Federal Defendants for Judgment on the Pleadings, depositions by plaintiffs identified in paragraph 4, supra)

6.a. Plaintiff Arthur Waskow was aware by January, 1972, that Robert Merritt was an informant for the Federal Bureau of Investigation.

b. Persons associated with the Institute for Policy Studies and with plaintiff Arthur Waskow, and attorneys for the Institute of Policy Studies, including Mitchell Rogovin and Robert Herzstein, were aware by January 1972, that Robert Merritt was an informant for the Federal Bureau of Investigation. (Robert Merritt, Waskow, Exhibits to Motion by Defendant Terry O'Connor for Judgment on the Pleadings)

7. Plaintiffs Booker and Abbott were aware before July, 1973, that Harold Bynum had been an undercover officer for the Metropolitan Police Department. (Booker, Abbott, Bynum)

8. Plaintiff Bloom was aware prior to July, 1973, that Special Agents of the Federal Bureau of Investigation were investigating the National Mobilization Committee. (Bloom; record and proceedings in Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2nd Cir. 1973))

9. Plaintiff Abbott was aware prior to July, 1973, that Special Agent Philip Wilson of the Federal Bureau of Investigation had been investigating his activities. (Abbott; excerpts of file pertaining to Abbott)

10. Defendant Brennan, Moore, Jones, Pangburn, and Grimaldi each believed that his actions at issue in this civil action were lawful and proper. In each instance, that belief was reasonable. (Brennan, Moore, Jones, Pangburn, Grimaldi; Sections 87, 107, and 122 of the FBI's Manual of Instructions; 18 U.S.C. § 2511(3); relevant case law relating to investigative activity, electronic surveillance, and use of informants; Memoranda from the Attorney General to the Director, FBI, dated September 14, 1967, May 6, 1969, and July 14, 1969; Memoranda between J. E. Hoover and J. Walter Yeagley dated May 1, 1968, June 17, 1968, September 19, 1968, and September 26, 1968; Memorandum from C. D. Brennan to W. C. Sullivan dated April 30, 1968)

III. Response To Plaintiffs' Statement
Of Facts To Be Proven

A. Against The FBI Defendants

1.a. Admitted.

b. Admitted, except it is further averred that defendant Gerald Grimaldi was COINTELPRO-New Left Coordinator in the Washington Field Office for a period of time in 1968 and 1969. (Grimaldi)

c. Admitted that defendant Courtland Jones was the Security Coordinating Supervisor of the Washington Field Office from 1964 to 1974. Denied that he directed or approved all non-criminal activities in the WFO. Admitted that during a portion of the time he was Security Coordinating Supervisor he was in a supervisory capacity with respect to defendants Grimaldi and Pangburn. (Jones, Grimaldi, Pangburn)

d. Admitted that defendant George C. Moore was Chief of the Racial Intelligence Section of the Domestic Intelligence Division of the FBI from 1967 to 1974. The remainder of the paragraph is denied insofar as it purports to state that defendant Moore personally directed or approved any activity affecting plaintiffs Booker or Eaton. Defendant Moore admits that his section was responsible for supervision of the Counterintelligence Program--Black Nationalist--Hate Groups and for general supervision of racial matters investigations. Defendant Moore denies that all activities of his section were coordinated with the activities of the Internal Security Section of the Domestic Intelligence Section. (Moore)

e. Admitted that defendant Charles Brennan was Chief of the Internal Security Section of the Domestic Intelligence Division of the FBI from approximately December, 1966, to the Summer of 1970, and that he was the Assistant Director in charge of the Domestic Intelligence Division from the Summer of 1970 to September, 1971. Defendant Brennan denies the remainder of this paragraph except he admits that in his capacity as Assistant Director he was defendant Moore's supervisor. (Brennan)

2. Denied, except it is admitted that the FBI instituted a Counterintelligence Program sometimes referred to as COINTELPRO.

a. Denied, except it is admitted that organizations and individuals were targets of activity carried out pursuant to COINTELPRO. (Brennan, Moore, Grimaldi, Jones)

b. Denied with respect to plaintiffs Washington Peace Center and Washington Area Women Strike for Peace. It is admitted that certain organizations were targets of COINTELPRO, but it is denied that the program was a conspiracy and it is denied that defendants took any action which caused injury to any plaintiff. (Brennan, Moore, Grimaldi, Pangburn, Jones, all plaintiffs)

3.a. Denied, except it is admitted that defendant Moore recommended that information regarding the Poor People's Campaign be provided to news media personnel. (Moore)



b. Denied, except it is admitted that defendant Grimaldi wrote the memorandum proposing the submission of fictitious housing forms, and the proposal was approved at Federal Bureau of Investigation Headquarters. Defendants Jones and Brennan deny any personal involvement or knowledge of the matter, and defendant Grimaldi denies knowledge as to whether the proposal was implemented and denies personal involvement if it was implemented. (Brennan, Moore, Jones, Grimaldi)

c. Denied.

d. Defendants have moved to strike this paragraph. If response is required, it is denied.

e. Denied.

f. Defendants have moved to strike this paragraph. If response is required, it is denied.

g. Denied; except defendant Grimaldi admits that pursuant to the Counterintelligence Program directed by FBI Headquarters he prepared a document called the Rational Observer and caused it to be distributed on the campus of American University; defendant Jones admits that he approved the recommendation to print and distribute the Rational Observer, and the recommendation was approved by William C. Sullivan, Assistant Director, Federal Bureau of Investigation; and defendant Brennan denies any personal involvement in the recommendation, approval, or implementation of the activity. (Brennan, Jones, Grimaldi)

h. Defendants have moved to strike this paragraph. If response is required, it is denied.

i. Defendants have moved to strike this paragraph. If response is required, it is denied.

j. Defendants have moved to strike this paragraph. If response is required, it is denied.

k. Defendant Webster admits that FBI records, indicate that conversations of plaintiffs Eaton, Booker, Pollock, Bloom, Abbott, and Waskow were overheard during electronic surveillances authorized by the Attorney General of the United States. Defendant Moore admits that he, as well as others, was involved in the

recommendation that the FBI conduct electronic surveillance of the Black Panther Party in Washington, D.C., and he admits that the Attorney General authorized the electronic surveillance. Defendant Brennan admits that he, as well as others, was involved in the recommendation that the FBI conduct electronic surveillance of the Black Panther Party and the People's Coalition for Peace and Justice in Washington, D.C., and he admits that the Attorney General authorized the electronic surveillance. Defendants aver that the electronic surveillances were based on good cause and were in compliance with existing procedural and legal requirements. Defendants deny personal knowledge that any plaintiff was overheard on these electronic surveillances. (Phillip Mostrum, Brennan, Moore, Jones)

1. Defendants have moved to strike this paragraph. If response is required, it is denied.

m. Denied.

n. Denied, except it is admitted by defendant Webster that the names of certain plaintiffs were included on the Security Index or the Administrative Index, and it is further averred that no plaintiff was summarily arrested and detained without charge by the Federal Bureau of Investigation. (Phillip Mostrum, all plaintiffs)

4. Denied.

B. Against the D.C. Defendants

This portion of plaintiffs' statement of facts does not pertain to the federal defendants, and no response by the federal defendants is required.

C. Against All Defendants

1. Denied.

2. Denied.

IV. Legal Contentions

1. The statute of limitations applicable to this civil action prescribes a limitations period no longer than three years.

a. Title 12, D.C. Code, Section 301.

b. Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974).

*c. Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., November 9, 1979).

2. Plaintiffs bear the burden of proving fraudulent concealment if they are to avoid the bar imposed by the statute of limitations. To prove fraudulent concealment, plaintiffs must prove that (1) the information fraudulently concealed was material, (2) the fraudulent concealment precluded plaintiffs from acquiring knowledge of the material facts, (3) plaintiffs did not know and by the exercise of due diligence could not have known, that they may have had a cause of action, and (4) the defendants had an affirmative duty to disclose information to plaintiffs or defendants had taken affirmative action to conceal facts which, if known, would have alerted plaintiffs that a cause of action existed.

*a. Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974), affirmed, 553 F.2d 220 (D.C. Cir. 1977).

b. General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3 (D.D.C. 1979).

c. Smith v. Nixon, 606 F.2d 1183 (D.C. Cir., 1979).

3. A civil conspiracy is not in itself actionable. Rather, a cause of action arises only if there is a conspiracy to do an unlawful act or to act in an unlawful manner, and an overt act is taken which injures the plaintiffs.

a. Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974).

*b. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

4. To establish entitlement to damages from the individual defendants under 42 U.S.C. § 1985(3), plaintiffs must prove that (1) two or more persons conspired for the purpose of depriving plaintiff of the equal privileges and immunities under the laws; (2) there was an act in furtherance of the object of the conspiracy which injured plaintiffs in their persons or property or deprived them of having and exercising any right or privilege of a citizen of the United States; and (3) the motivation for the conspirators' actions was "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."

*a. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).



5. Investigative activity by government law enforcement agents which does not cause specific, objective harm or threaten specific future harm does not violate the constitutional rights of plaintiffs. Allegations or proof of subjective "chill" of the exercise of rights is not compensable in damages.

*a. Laird v. Tatum, 408 U.S. 1 (1972).

b. Fifth Avenue Peace Parade v. Gray, 480 F.2d 326 (2nd Cir. 1973).

*c. Reporters Committee for Freedom of the Press v. American Telephone and Telegraph Co., 593 F.2d 1030, 1052 (D.C. Cir. 1978).

6. Use of informants by law enforcement authorities is not actionable and does not trench upon any rights guaranteed by the Constitution of the United States. In the absence of a specific incident of misconduct by an informant, resulting in specific injury, in which the informant was acting under the direction and control of a defendant, there is no violation of constitutional rights.

*a. Handschu v. Special Services Division, 349 F. Supp. 766, 769 (S.D.N.Y. 1972).

b. Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 153-54 (D.D.C. 1976).

*c. Socialist Workers Party v. Attorney General, 565 F.2d 19 (2nd Cir. 1977).

7. To be held personally liable in damages to plaintiffs, a federal officer must be proven to have personally participated in or directed the commission of the act which caused judicially cognizable injury to the plaintiff.

*a. Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976).

b. Lander v. Morton, 518 F.2d 1084, 1087 (D.C. Cir. 1976).

c. Robertson v. Sichel, 127 U.S. 507 (1888).

8. A claim of mental and emotional distress is not actionable under the civil rights statute, 42 U.S.C. §§ 1983, 1985(3).

*a. Robinson v. McCorkle, 462 F.2d 111 (3rd Cir. 1972).

b. Dear v. Rathje, 391 F. Supp. 1 (N.D. Ill. 1975).

c. Taylor v. Nichols, 409 F. Supp. 927 (D. Kan. 1976).

9. A federal officer may not be held liable in damages to plaintiff if he proves that (1) he believed in good faith that his conduct was lawful, and (2) his belief was reasonable.

*a. Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1348 (2nd Cir. 1972).

b. Procunier v. Navarette, 434 U.S. 555 (1978).

10. With regard to warrantless electronic surveillances authorized by the Attorney General for purposes of protecting the national security, the holding of United States v. United States District Court, 407 U.S. 297 (1972) may not be retroactively applied to hold a federal officer civilly liable in damages.

*a. Weinberg v. Mitchell, 588 F.2d 275 (9th Cir. 1978);
But see, Zweibon v. Mitchell, 606 F.2d 1172 (1979).

11. The Federal Bureau of Investigation has authority to conduct domestic intelligence investigations.

*a. United States v. United States District Court, 407 U.S. 297, 310 (1972).

b. United States v. Barsky, 167 F.2d 241 (D.C. Cir. 1948).

*c. 28 C.F.R., Section 0.85(d).

12. Plaintiffs are entitled only to compensatory damages for any violation of their constitutional rights.

*a. Carey v. Piphus, 435 U.S. 247 (1978).

V. Narrative Statement of the Law and Facts

This civil action was commenced on July 16, 1976, by individuals and organizations claiming to have been active during the late 1960's and early 1970's in various political activities in the District of Columbia designed to express their discontent with governmental policies and to bring their views to the attention of the public and of government authorities of both the District of Columbia and the United States.

The plaintiffs allege that from 1968 to 1973 the defendants engaged in certain categories of activities affecting the plaintiffs:



(1) using undercover agents to fraudulently gain entry to private meetings to learn the plans and programs of plaintiffs; (2) electronic surveillance without judicial authorization; (3) breaking and entering to obtain membership lists and other private political documents; (4) mail interception; (5) physical surveillance, that is, surreptitiously following plaintiffs or monitoring plaintiffs' political activities; and (6) disrupting and interfering with plaintiffs' political activities by (a) urging violent or unlawful actions and (b) supplying the public and/or news media with false information about the plaintiffs and their plans. [Amended Complaint, ¶¶27-29].

Plaintiffs allege that their cause of action is based on the First, Fourth, Fifth, and Ninth Amendments to the Constitution of the United States, 42 U.S.C. §§ 1985(3) and 1986, the United States and District of Columbia statutes governing the interception of oral communications, and common law of trespass, conversion, and invasion of privacy. Jurisdiction is alleged under 28 U.S.C. §§ 1331, 1343, 1337, and 1355.

In the Amended Complaint, plaintiffs named approximately forty Special Agents and officials of the Federal Bureau of Investigation as defendants. Of those, only five remain as defendants: Charles D. Brennan, George C. Moore, Courtland J. Jones, Gerould Pangburn, and Gerald T. Grimaldi.

During the period relevant to the subject matter of this civil action, defendants Brennan and Moore were assigned to Federal Bureau of Investigation Headquarters. Defendant Brennan was the Chief of the Domestic Intelligence Division from approximately December, 1966, to the Summer of 1970. From the Summer of 1970 to September, 1971, he was the Assistant Director in charge of the Domestic Intelligence Division. Defendant Moore was, from 1967 to 1974, Chief of the Racial Intelligence Section of the Domestic Intelligence Division.

Defendants Jones, Pangburn, and Grimaldi were, during at least a portion of the relevant time period, assigned to the Federal Bureau of Investigation's Washington Field Office. From 1964 to 1974, defendant Jones was the Security Coordinating Supervisor for



the Washington Field Office. In that capacity he had overall supervisory responsibility for all intelligence gathering activities, including internal security and foreign counterintelligence matters, carried out by that office. Defendant Pangburn was, for a period of time, assigned to conduct internal security investigations and from May, 1972, to October, 1974, was supervisor of the squad in that office having responsibility for investigating racial matters and extremist organizations. Defendant Grimaldi was assigned in or around May, 1968, to be the field office's "coordinator" of the program instituted by the Director of the FBI to disrupt the New Left. He was the designated "coordinator" during 1968 and 1969 in addition to his other investigative assignments. From April, 1971, to April, 1972, defendant Grimaldi was the supervisor of the squad having responsibility for investigating racial matters and extremist organizations.

A. The Action Is Barred By The
Statute of Limitations

No federal statute of limitations governs limitations of actions brought under the Civil Rights Act of 1871, 42 U.S.C. § 1981 et seq., or under the rationale of Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971); therefore, the Court must look to the appropriate period stated in a statute of local application.^{*/} Shifrin v. Wilson, 412 F. Supp. 1282, 1301 (D.D.C. 1976).

In the District of Columbia, the period of limitations applicable to this action is not longer than three years. Section 301(8), Title 12, D.C. Code, provides a three year limitations period for claims ". . . for which a limitations period is not otherwise specifically prescribed."

The activity of which plaintiffs complain allegedly occurred from 1968 to 1973 and the Complaint was not filed until July, 1976. No defendant is alleged to have committed any act subsequent to July 16, 1973, and no act, regardless of by whom committed, is

^{*/} The exception to this situation is 42 U.S.C. § 1986, which has a specifically stated one year limitations period.



alleged to have occurred subsequent to July 16, 1973. The face of the complaint shows, therefore, that the action is barred by the statute of limitations.

Plaintiffs have no apparent means of avoiding the bar imposed by the statute of limitations. Plaintiffs have the affirmative obligation of alleging and proving fraudulent concealment if they are to avoid the bar imposed by the statute of limitations. See Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974), affirmed, 553 F.2d 220 (D.C. Cir. 1977).

In addition, plaintiffs must show either that defendants had an affirmative duty to disclose information or that they took affirmative action to conceal material facts. Silence does not constitute fraudulent concealment. Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979); General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3, 8 (D.D.C. 1979).

Not only have plaintiffs not demonstrated that defendants had an affirmative duty to disclose information to them, but also they cannot escape their own duty to exercise "due diligence." Moreover, the record of this action, including specifically the responses of plaintiffs to discovery, indicates that more than three years prior to the commencement of this action plaintiffs possessed the material facts to form the basis for intelligent prosecution of their claims. See Emmett v. Eastern Dispensary Casualty Hospital, 396 F.2d 931, 937 (D.C. Cir. 1967). Their failure to bring a timely action cannot be excused and it should be dismissed.

B. Defendants May Be Held Liable Only For Acts In Which They Were Personally Involved

Many of plaintiffs' allegations pertain to activity in which the defendants alleged to be liable were not personally involved. Plaintiffs' theory of recovery in these instances is apparently based on the false proposition that a superior or associate of another Special Agent is liable for the actions of the other agent.

The law is established that, absent some degree of direct responsibility, a federal official will not be held liable in damages for the wrongdoing of subordinates. The policy supporting

this rule was enunciated by the Supreme Court in Robertson v. Sichel, 127 U.S. 507 (1888):

[T]o permit recovery against the [superior] . . . would be to establish a principle which would paralyze the public service. Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person.

127 U.S. at 515.

In Green v. Laird, 357 F. Supp. 227 (N.D. Ill. 1973), a suit against federal officers, the court said:

To hold these defendants liable on the theory of respondeat superior would ultimately transform this into a suit against the United States, which is immune from suit under the doctrine of sovereign immunity under 28 U.S.C. 2680(a) [P]ersonal involvement is required to hold federal supervisory personnel liable for the acts of their subordinates.

357 F. Supp. at 230.

In a case involving two former Special Agents in Charge of the Denver, Colorado, Division of the Federal Bureau of Investigation, Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976), the court upheld a directed verdict in favor of the defendants where the evidence failed to show that "any defendant instigated the investigation of plaintiff, directed its course, participated or acquiesced therein." 546 F.2d at 338. Citing Rizzo v. Goode, 423 U.S. 362 (1976), the court held that "before a superior may be held for acts of an inferior, the superior, expressly or otherwise, must have participated or acquiesced in the constitutional deprivations of which complaint is made." 546 F.2d at 337.

Proof of personal participation to hold federal officers personally liable in damages has also been required by the Courts in Black v. United States, 534 F.2d 524, 527-28 (2nd Cir. 1976); Lander v. Morton, 518 F.2d 1084, 1087 (D.C. Cir. 1976); Tucker v. Duke, 276 F.2d 499 (D.C. Cir. 1960); Jackson v. Wise, 385 F. Supp. 1159, 1163 (D. Utah 1974); and Byrd v. Warden, Federal Detention Headquarters, 376 F. Supp. 37, 39 (S.D.N.Y. 1974).



C. The Federal Bureau of Investigation Has Authority To Investigate Matters Relating To The National Security

The authority of the Federal Bureau of Investigation to conduct ongoing domestic intelligence investigations has both constitutional and statutory foundations.

The Supreme Court, in United States v. United States District Court, 407 U.S. 297 (1972), observed that:

[T]he President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to "preserve, protect and defend the Constitution of the United States." Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. 407 U.S. at 310.

To perform this duty properly and adequately the President and the appropriate departments and agencies must rely on a broad range of intelligence information, for only by inquiring into potential threats may the Government be prepared to protect itself against the clear and present threats. Cf., Dennis v. United States, 341 U.S. 494, 509 (1951); United States v. Barsky, 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948).

The statutory basis for the Federal Bureau of Investigation's assignment and activities in gathering domestic intelligence information may be found in the numerous Federal criminal statutes dealing with, for example, treason, espionage, sabotage, sedition, advocacy of violent overthrow of the Government, civil disorders, and riots. In addition, the responsibilities imposed upon the Federal Bureau of Investigation by the various Federal personnel loyalty and security programs, e.g., 5 U.S.C. § 1304, 50 U.S.C. App. § 2255, 42 U.S.C. § 2165, 42 U.S.C. § 2455, 22 U.S.C. § 2519, and 22 U.S.C. § 2585; by the National Security Act of 1947, 50 U.S.C. §§ 401 et seq.; and by the Immigration and Naturalization Act of 1952, 8 U.S.C. §§ 1101 et seq., require, and establish the basis for, the conduct of ongoing domestic intelligence operations commensurate with the purposes to be accomplished.

By virtue of the delegation of responsibility to him by the President and by Congress, the Attorney General shares in both the effectuation of the President's relevant constitutional duties and



the enforcement of the regulatory and penal acts of Congress. The Attorney General's power of delegation to the Federal Bureau of Investigation rests directly upon the authority of section 533, title 28, U.S.C., as well as the general provisions of 28 U.S.C. §§ 509, 510, and 5 U.S.C. § 301. Section 533 authorizes the Attorney General to appoint officials "to detect and prosecute crimes against the United States," and "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." By regulation, 28 C.F.R. § 0.85, the Attorney General has directed the Federal Bureau of Investigation to investigate violations of the laws of the United States and to conduct personnel investigations pertinent to the loyalty and security program. In addition, section 0.85(d), 28 C.F.R., directs the Federal Bureau of Investigation to carry out the Presidential directives "to take charge of investigative work in matters relating to espionage, sabotage, subversive activities, and related matters."

Within this framework of authority, the Federal Bureau of Investigation conducted the investigation of the plaintiffs.

D. Investigative Activity Itself Does Not Violate Plaintiffs' Constitutional Rights

Plaintiffs allege that the defendants conducted investigations of plaintiffs which were longer in duration and more intense in degree than necessary for any proper law enforcement function. In addition to the fact that none of the present federal defendants were engaged in any direct investigation of any plaintiff, plaintiffs identify no occasions, events, or actions in which a defendant caused injury to a plaintiff. Plaintiffs also describe no occasions in which they were deprived of the enjoyment of a constitutional right or prohibited from, or punished for, the exercise of a constitutional right. Their activities prove, in fact, that they freely and without fail organized and participated in demonstrations, gave public speeches, and in general fully exercised and enjoyed their rights.



Plaintiffs' allegations of a subjective "chill" of their rights, or interference with the rights of others, are not actionable. They must allege and prove direct interference, present objective harm, or the specific threat of objective future harm to recover damages from defendants. Laird v. Tatum, 408 U.S. 1 (1972); Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2nd Cir. 1973); Donohue v. Duling, 465 F.2d 196 (4th Cir. 1972). Nor does the fact that plaintiffs were engaged in activity protected by the First Amendment make them immune from investigations. Reporters Committee for Freedom of the Press v. ATT, 593 F.2d 1030 (D.C. Cir. 1978).

Moreover, the use of informants by law enforcement authorities is not itself actionable and does not trench upon any rights guaranteed by the Constitution of the United States. As at least one court has recognized in the context of civil litigation,

the use of secret informers or undercover agents is a legitimate and proper practice of law enforcement--indeed, without the use of such agents many crimes would go unpunished and wrongdoers escape prosecution
The use of informers and infiltrators by itself does not give rise to any claim of violation of constitutional rights.

Handschu v. Special Services Division, 349 F. Supp. 766, 769 (S.D.N.Y. 1972) (emphasis supplied). Similarly, the United States Court of Appeals for the Second Circuit has noted that

the FBI has a right, indeed a duty, to keep itself informed with respect to the possible commission of crimes; it is not obligated to wear blinders until it may be too late for prevention.

Socialist Workers Party v. Attorney General, 510 F.2d 253, 256 (2nd Cir. 1974).

In the absence of specific incidents of misconduct, plaintiffs do not state a cause of action relating to the alleged use of informants. Surveillance by informants, whether overt or covert, does not violate any constitutional rights. Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 153-54 (D.D.C. 1976), remanded on other grounds, No. 76-1647, decided March 19, 1979 (D.C. Cir.). See Hoffa v. United States, 385 U.S. 293, 311 (1966); United States v. White, 401 U.S. 745, 749 (1971).



E. Plaintiffs Cannot Establish The
Elements Necessary To Recover
Under 42 U.S.C. § 1985(3)

Plaintiffs have alleged that the federal defendants entered into a conspiracy among themselves to injure plaintiffs. They do not allege, however, any details of the conspiracy, such as when it was formed, who participated it, and what was the nature of the agreement.*/ The only factor connecting the federal defendants is that they were employed by the Federal Bureau of Investigation, but there was never an occasion in which all five were tied together in any common enterprise, and there was never an occasion in which any were doing anything other than carrying out duties and obligations imposed by policies established by their superiors.

The cause of action based on conspiracy is brought pursuant to 42 U.S.C. § 1985(3). Establishment of a claim under that statute requires proof of these essential elements: (1) two or more persons must have conspired for the purpose of depriving plaintiff of the equal protection of the laws, or of equal privileges and immunities under the laws; (2) there must have been an act in furtherance of the object of the conspiracy which injured plaintiff in his person or property or deprived him of having and exercising any right or privilege of a citizen of the United States; and (3) the motivation for the conspirators' actions must have been "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

Plaintiffs fail to establish these elements. A civil conspiracy is a combination of two or more persons to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose. Ammlung v. City of Chester, 494 F.2d 811 (3rd Cir. 1974). For the conspiracy to exist, there must be some express or implied agreement among the conspirators in the object of the conspiracy. See Morton Buildings of Nebraska, Inc. v.

*/ Plaintiffs have also, from time to time, alleged a conspiracy between the federal defendants and the D.C. defendants. Plaintiffs are silent with regard to the details of this alleged conspiracy.



Morton Building, Inc., 531 F.2d 910, 917 (8th Cir. 1976). It is required that there be some bond among the conspirators, beyond mere association or common employment, constituting agreement, unity of purpose, or common design. Tyrrell v. Taylor, 342 F. Supp. 9 (E.D. Pa. 1975).

In addition, the courts have held that there is no conspiracy where the act complained of is essentially the act of a single entity. Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972). If the actions complained of here are deemed to be the fruit of concerted action of two or more individuals, it must also be recognized that they were the result of the collective judgment of individuals acting as representatives of a single entity, the Federal Bureau of Investigation. Conspiracy among agents of a single entity is not sufficient to support a cause of action under 42 U.S.C. § 1985(3). Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1370 (W.D. Pa. 1977); Keddie v. Pennsylvania State University, 412 F. Supp. 1264 (M.D. Pa. 1976).

Plaintiffs have failed to allege that the so-called conspiracy was motivated by any class-based animus. Plaintiffs have thus expressed an intention not to prove an essential element of her conspiracy claim and it should be dismissed. Voytko v. Ramada Inn of Atlantic City, 445 F. Supp. 315, 324 (D.N.J. 1978).

Even if plaintiffs had made formally correct allegations, they cannot establish this necessary element of a claim under 42 U.S.C. § 1985.* / "Invidiously discriminatory animus," as a state of mind, implies malice, ill-will, or hatred against a group or class which is intense enough to invest an individual's actions toward the group with an improper motive. The test is not met by showing that an individual lacks affection or even harbors some resentment or dislike for the class. The animus must be so strong as to

* / Although the courts are generally holding that certain non-racial classes may be appropriate where claims are made under 42 U.S.C. § 1985(3), see, e.g., Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973), a class consisting of all persons who disagree with the political and economic policies of the government is too vague to satisfy the requirement of the statute, see Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa. 1973). See also Voytko v. Ramada Inn of Atlantic City, 445 F. Supp. 315, 324 n. 13 (D.N.J. 1978).



constitute a significant or deciding element in the conception and execution of the act complained of. As stated in Robinson v. McCorkle, 462 F.2d 111 (3rd Cir. 1972),

[A] conspiracy claim based upon 42 U.S.C. 1985(3) requires a clear showing of invidious, purposeful and intentional discrimination between classes or individuals."

462 F.2d at 113.

Finally, plaintiffs must prove that there occurred an overt act in furtherance of the object of the conspiracy which injured them in their person or property or deprived them of having and exercising any right or privilege of a citizen of the United States. Plaintiffs allege no such injury.

The conspiracy claim therefore fails for the reason that (1) defendants did not engage in a conspiracy, (2) defendants were not motivated by an invidiously discriminatory animus against plaintiffs, and (3) no plaintiffs were deprived of having and exercising any right or privilege of a citizen of the United States.

F. Defendants Are Not Liable In Damages
For Electronic Surveillance

Certain of the plaintiffs were overheard on electronic surveillances authorized by the Attorney General of the United States for the purpose of obtaining information deemed by him to be necessary to protect against the overthrow of the Government by force or other unlawful means or against a clear and present danger to the structure or existence of the Government

Defendants Moore and Brennan were, at various times, involved in the recommendation for the electronic surveillances at issue; however, in each instance they were following procedures established by the Attorney General and the Director of the Federal Bureau of Investigation, and, in each instance, the recommendations were approved by the Director and the Attorney General.

It is true that the procedures involved in authorizing and conducting warrantless electronic surveillances for domestic intelligence purposes were declared to be in violation of the Fourth Amendment in United States v. United States District Court, 407 U.S. 297 (1972). The electronic surveillances at issue here



were conducted prior to that decision, and defendants Moore and Brennan, as subordinate officials of the FBI, were obligated to act in accordance with the procedures and policies imposed by the Attorney General. Consequently, they should not be held liable in damages for their subordinate role in the execution of the electronic surveillances:

[T]here is . . . a legal obligation on the part of employees of the Justice Department to carry out the directives of their superiors when those superiors assure them their actions are legal. I think it would be unrealistic to suppose that employees of the Justice Department should be forced to choose between termination of employment for refusal to follow directives and maintenance of a correct view of constitutional duties in opposition to the incorrect view of superiors. Civil disobedience within the Department is highly unlikely and we may doubt whether it should be encouraged.

Zweibon v. Mitchell, 516 F.2d 594, 675, 678-79, fn. 12 (D.C. Cir. 1975) (Bazelon, J., concurring).

Furthermore, the holding in United States v. United States District Court, supra, should not be retroactively applied for purposes of holding these defendants liable in damages. This precise issue was addressed in Weinberg v. Mitchell, 588 F.2d 275 (9th Cir. 1978):

[R]etroactively applying Keith [U.S. v. U.S. District Court] to create civil liability when the result of that decision was not clearly foreshadowed would be as inequitable as ex post facto criminal liability. [Former Attorney General John Mitchell] asserts that to hold him personally liable for exercising his statutory responsibility to evaluate and act upon an uncertain area of the law would be nothing short of punitive. We agree.

588 F.2d at 278. But see Zweibon v. Mitchell, 606 F.2d 1172 (D.C. Cir. 1979).

G. Each Federal Defendant Is Immune From Liability In Damages

Each of the defendants believed in good faith that his actions were lawful, and his belief in this regard was reasonable. Accordingly, none of the defendants is liable in damages to plaintiff.

In Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972), the Court recognized that federal officers are entitled to plead good faith as a defense in a civil action alleging the depri-

vation of constitutional rights. As the Court stated, "At common law the police officer always had available to him the defense of good faith and probable cause, and this has been consistently read as meaning good faith and 'reasonable belief' in the validity of [his challenged actions]." 456 F.2d at 1347. In establishing this defense the Court made the following observation:

Therefore, to prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus, the officer must allege and prove not only that he believed in good faith that his conduct was lawful, but also that his belief was reasonable. And so, we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and the search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. 456 F.2d at 1348.

The concurring opinion explained that this "lesser standard" is proper because Federal officers cannot be expected to foresee what determination a federal judge will later make. Bivens, supra, at 1348, 1349 (Lombard, J., concurring).

In this instance, if the federal defendants' conduct is held to be illegal, it would be because of a judicial determination which defendants could not have predicted, viz., that the Federal Bureau of Investigation has no lawful authority to investigate for national security purposes or that the particular investigative acts were for some reason unlawful. Defendants should not be civilly liable where their own conduct was non-intrusive and reasonably believed to be legal. As the court stated in Bowens v. Knazze, 237 F. Supp. 826 (N.D. Ill. 1965):

[T]he actions of a police officer cannot be tortious when the officer proceeds on the basis of his reasonable good faith understanding of the law and does not act with unreasonable violence or subject the citizen to unusual indignity. The facts alleged in the complaint demonstrate conclusively that the defendant could not reasonably have foreseen that a deprivation of constitutional rights might have resulted from his conduct. Under such circumstances the complaint must be dismissed. 237 F. Supp. at 829.

See also Tritsis v. Backer, 355 F. Supp. 225 (N.D. Ill. 1973), affirmed, 501 F.2d 1021 (7th Cir. 1974).

Conclusion

The federal defendants are entitled to judgment in their favor.


Respectfully submitted,

J. PAUL McGrath
Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney



BROOK HEDGE



DAVID H. WHITE

Attorneys, Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for federal defendants



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
_____)	

FEDERAL DEFENDANTS' PROPOSED VERDICT FORM

Federal defendants, pursuant to Rule 49(b) of the Federal Rules of Civil Procedure, request a general verdict accompanied by answers to interrogatories. Federal defendants propose the following interrogatories:

1. Did each plaintiff believe, or have reason to believe, prior to July 16, 1973, that he had grounds to bring suit against agents of the Federal Bureau of Investigation or officers of the Metropolitan Police Department? [List each plaintiff]

2. Did each of the defendants have a duty to disclose information, prior to July 16, 1973, to plaintiffs regarding their actions as FBI agents or police officers? [List each defendant]

3. Did any defendant commit an act or make a statement for the purpose of deliberately concealing from any plaintiff information which would have alerted the plaintiff that he had grounds for a suit against that defendant? [List each defendant]

4. Did any act or event occur which injured any plaintiff's person? [List each plaintiff]

5. Did any act or event occur which injured any plaintiff's property? [List each plaintiff]

6. Did any act or event occur which injured any plaintiff's constitutional rights? [List each plaintiff]

7. Did any defendant commit an act or personally participate in an act which injured any plaintiff's person? [List each defendant]

8. Did any defendant commit an act or personally participate in an act which injured any plaintiff's property? [List each defendant]



9. Did any defendant commit an act or personally participate in an act which injured any plaintiff's constitutional rights?

[List each defendant]

10. Did each defendant act in his capacity as an agent of the Federal Bureau of Investigation or officer of the Metropolitan Police Department. [List each Defendant]

11. Did each defendant act in accordance with procedures, regulations, or policies established by his superiors in the Federal Bureau of Investigation or the Metropolitan Police Department? [List each defendant]

12. Did each defendant believe that his actions were proper? [List each defendant]

13. Was each defendant's belief that his actions were proper a reasonable belief to have under the circumstances that existed at the time of his act? [List each defendant]

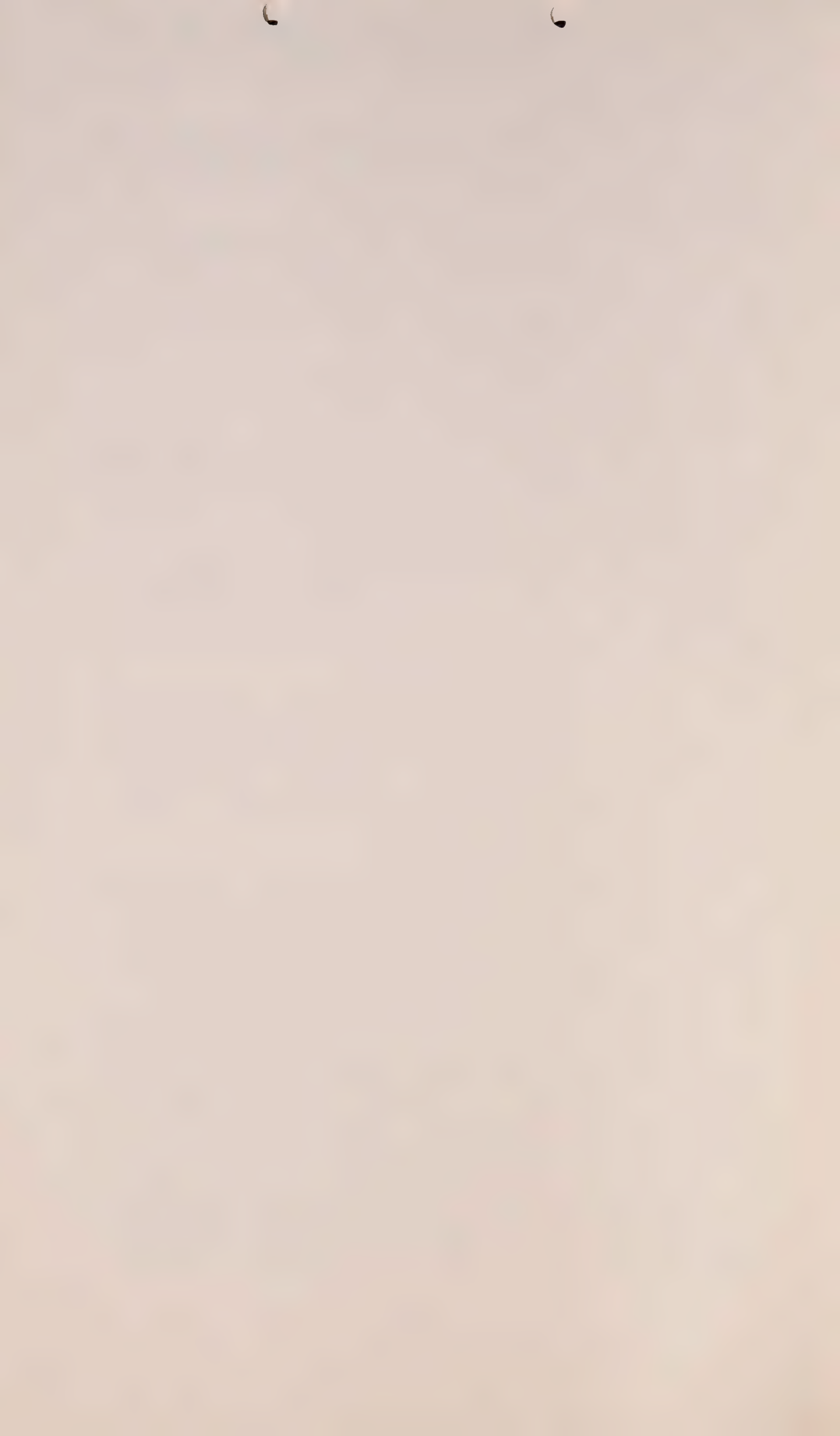
14. Did any of the defendants enter into an agreement or conspiracy among themselves for the purpose of violating the rights of the plaintiffs? Please list the defendants, if any, who participated in any such conspiracy.

15. Did any of the defendants who were FBI agents enter into an agreement or conspiracy with any of the defendants who were Metropolitan Police Officers for the purpose of violating the rights of the plaintiffs? Please list the defendants, if any, who participated in such a conspiracy.

16. Did any of the defendants commit an act, as a result of any such conspiracy, which caused injury to the person of any plaintiff? Please list the defendants, if any, who committed any such act, and the plaintiffs, if any, who were injured.

17. Did any of the defendants commit an act, as a result of any such conspiracy, which caused injury to the property of any plaintiff? Please list the defendants, if any, who committed any such act, and the plaintiffs, if any, who were injured.

18. Did any of the defendants commit an act, as a result of any such conspiracy, which caused injury to the constitutional rights of any plaintiff? Please list the defendants, if any,



who committed any such act, and the plaintiffs, if any, who were injured.


19. Were the defendants, if any, who participated in any such conspiracy, motivated by a discriminatory bias against the race, sex, or other characteristic of the plaintiff?

Federal defendants reserve the right to modify these interrogatories or to propose additional interrogatories as necessary in light of the evidence presented at trial.

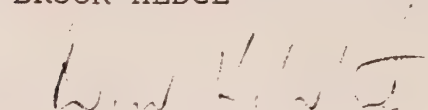
Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney



BROOK HEDGE



DAVID H. WHITE

Attorneys, Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for federal defendants



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
<hr/>		

EXHIBIT LIST

1. Memorandum from the Attorney General to the Director, FBI, May 6, 1969.
2. Memorandum from the Attorney General to the Director, FBI, July 14, 1969.
3. Memorandum from the Attorney General to the Director, FBI, September 14, 1967.
4. Executive Order 11365, July 29, 1967.
5. SAC letter 67-72, October 17, 1967.
6. SAC letter 69-31, June 3, 1969.
7. Memorandum from J. Walter Yeagley to J. Edgar Hoover, September 19, 1968.
8. Memorandum from J. Edgar Hoover to J. Walter Yeagley, September 26, 1968.
9. Memorandum from Charles D. Brennan to William C. Sullivan, April 30, 1968.
10. Memorandum from J. Edgar Hoover to J. Walter Yeagley, May 1, 1968.
11. Memorandum from J. Walter Yeagley to J. Edgar Hoover, June 17, 1968.
12. Excerpts from files pertaining to each plaintiffs.
13. Sections 87, 107, and 122, FBI Manual of Instruction, effective 1967 to 1974.
14. Memorandum from Director, FBI, to the Attorney General, July 2, 1968.
15. Remarks of Attorney General John N. Mitchell Before the Kentucky State Bar Association, April 23, 1971.

16. An address of John N. Mitchell, Attorney General, Before the Virginia State Bar Association, June 11, 1971.

17. Memorandum from Director, FBI, to the Attorney General, July 3, 1969.

18. Article by Robert Wall, "Potomac Magazine", Washington Post, March 5, 1972.

19. Article by Robert Wall, New York Review of Books, January 27, 1972.

20. Newspaper Article, "Former FBI Man Discloses IRS Tactics Against Radicals, Washington Star, January 13, 1972.

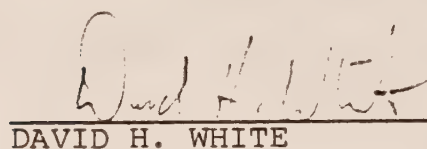
21. Plaintiffs Answers to Interrogatories in Institute for Policy Studies v. Mitchell, Civil Action No. 74-316 (D.D.C.).

Respectfully yours,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney


BROOK HEDGE


DAVID H. WHITE

Attorneys, Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for federal defendants

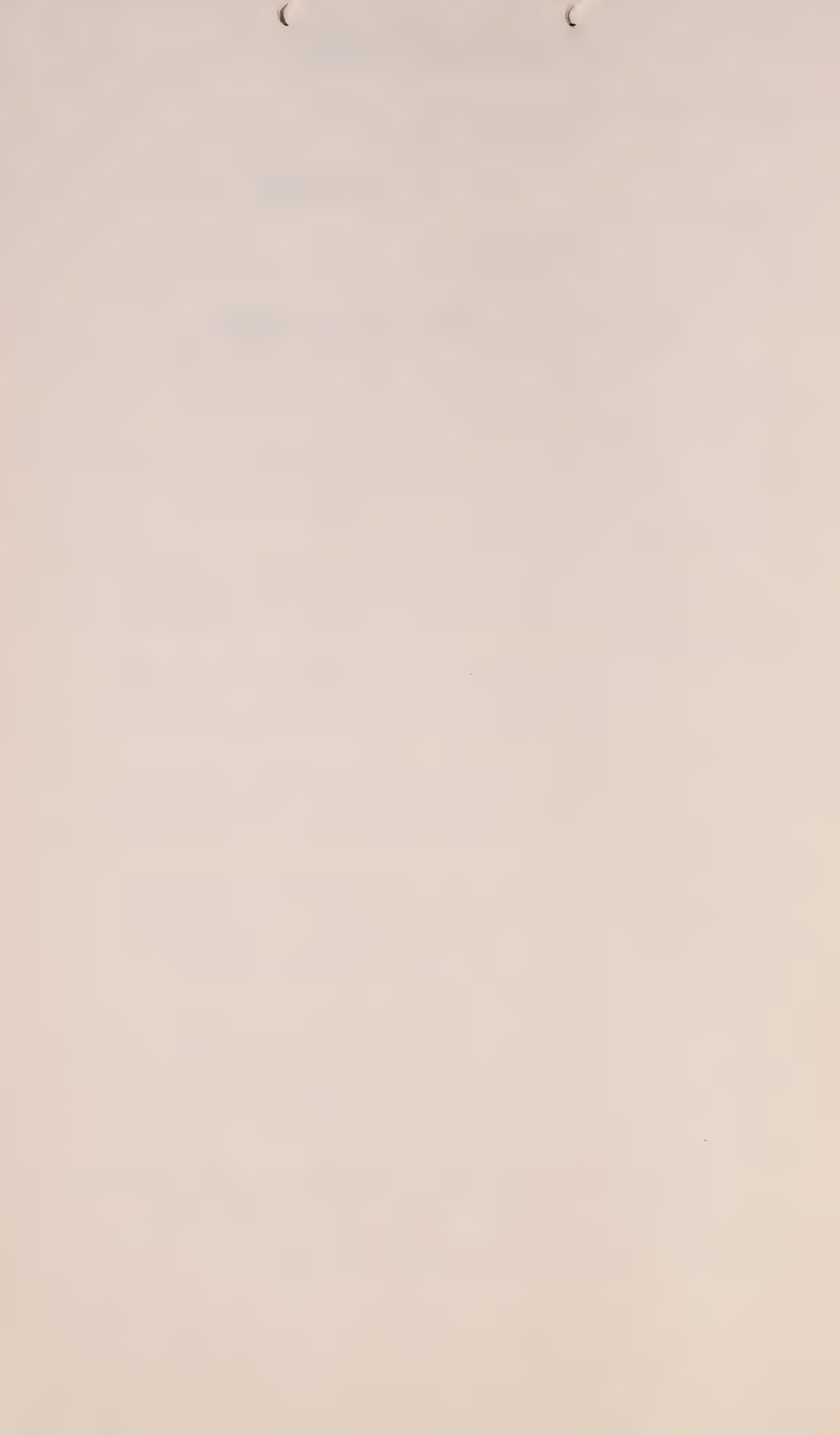


UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
)	

FEDERAL DEFENDANTS' PROPOSED VOIR DIRE QUESTIONS

1. Is there anyone on the jury panel who knows or has been introduced to any of the counsel for the plaintiffs: Dan Schember, Anne Pilsbury, or J.E. McNeil?
2. Is there anyone on the jury panel who knows or who has ever been introduced to counsel for the federal defendants: David White or Dennis Hoffman?
3. Is there anyone on the jury panel who knows or has ever been introduced to counsel for the D.C. defendants: Laura Bonn or George Barclay?
4. I will read the names of the plaintiffs in the case and then I will ask any member of the panel who knows any one of them to please so indicate.
5. I will read the names of the defendants and then I will ask any member of the panel who knows any one of them to please so indicate.
6. Is there any member of the jury panel who is now or was formerly employed by the District of Columbia, or who has some member of his or her immediate family employed or formerly employed by the District of Columbia?
7. Is there any member of the panel who is now or was formerly employed by, or has some member of his or her family now or formerly employed by, any law enforcement or security agency, either public or private?
8. Is any member of the panel or any member of your immediate family employed by the Federal Bureau of Investigation, the Department of Justice, or any other federal agency?



9. Has any member of the panel studied law, or has any member of his or her family studied law?

10. The evidence in this case may indicate a conflict between the testimony of certain police officers and FBI agents and certain other persons. Is there anyone on the jury panel who feels that police officers and FBI agents, because of their position, are any less likely to be telling the truth than persons who are not police officers or FBI agents?

11. Has anyone on the jury panel or any member of your immediate family had any personal experience in which you have suffered any personal injury or any property damage in connection with any demonstrations or civil disorders or riots of any kind at any time?

12. Has anyone on the jury panel or any member of your family participated in any demonstration relating to civil rights, protesting the Vietnam War, or protesting the construction of highways and bridges in the Washington Metropolitan area?

13. Has anyone on the jury panel or any member of your family been arrested or detained by the police while participating in any demonstration?

14. Has any member of the jury panel or any member of your family ever been a member of or associated with,

- a. the Emergency Committee on the Transportation Crisis,
- b. the National Mobilization Committee, the Student Mobilization Committee, or the New Mobilization Committee,
- c. the Institute for Policy Studies,
- d. the Students for a Democratic Society,
- e. the Socialist Workers Party,
- f. the Communist Party,
- g. the Peoples Coalition for Peace and Justice,
- h. the Black Panther Party, or
- i. the Washington Peace Action Coalition or the National Peace Action Coalition?

15. Do you believe that the Federal Bureau of Investigation should not have investigated groups or persons who organized demonstrations in opposition to the war in Vietnam or who engaged in acts of disobedience to the law because of their opposition to the war in Vietnam?

16. At the end of the next series of questions I am going to ask that each person who has an affirmative answer to one or more of the questions stand and come to the bench.

Again, let me say that these questions are not intended to pry into your personal background, background, but to assist us in choosing a fair and impartial jury panel.

a. Have any of you, or your close family or friends, ever been the victim of a crime?

b. Have any of you, or your relatives or friends, ever been a witness to an alleged criminal offense?

c. Have you, or any members of your family ever been arrested or convicted of a criminal offense?

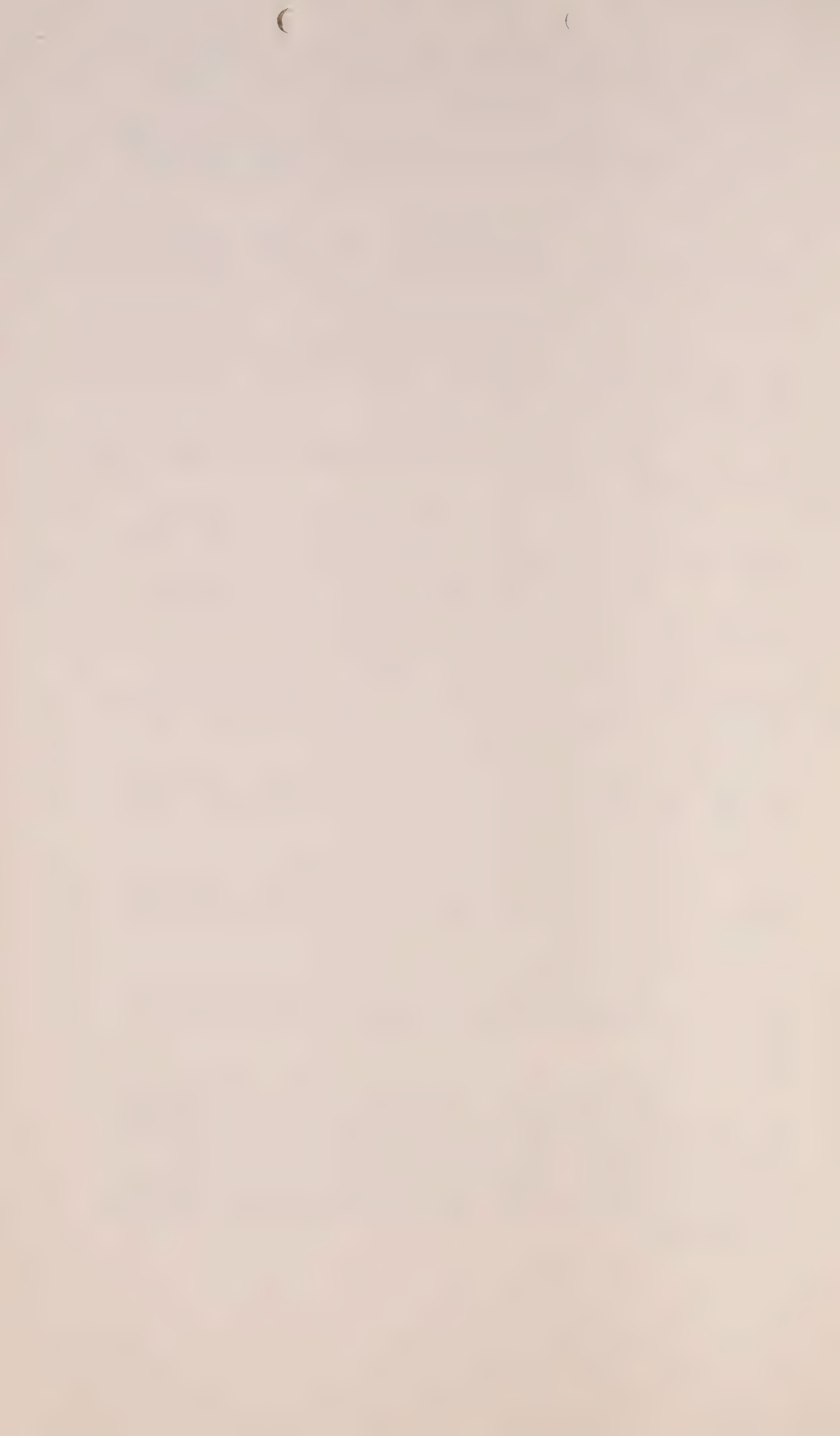
If any of you have a "yes" answer to any or all the questions, please stand and form a line, and you will be permitted to approach the bench and answer in privacy.

16. At the end of the next series of questions I am going to ask that each person who has an affirmative answer to one or more of them stand and come to the bench.

a. Have any of you or your close family or friends ever been involved in a civil suit against the District of Columbia or the Federal Government?

b. Have any of you or your close friends or family ever filed a claim against the District of Columbia or the Federal Government?

c. Have any of you or your close family or friends ever had any contact with the District of Columbia, the Metropolitan Police Department, the Department of Justice, or the Federal Bureau of Investigation which you consider particularly favorable or unfavorable?




Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney

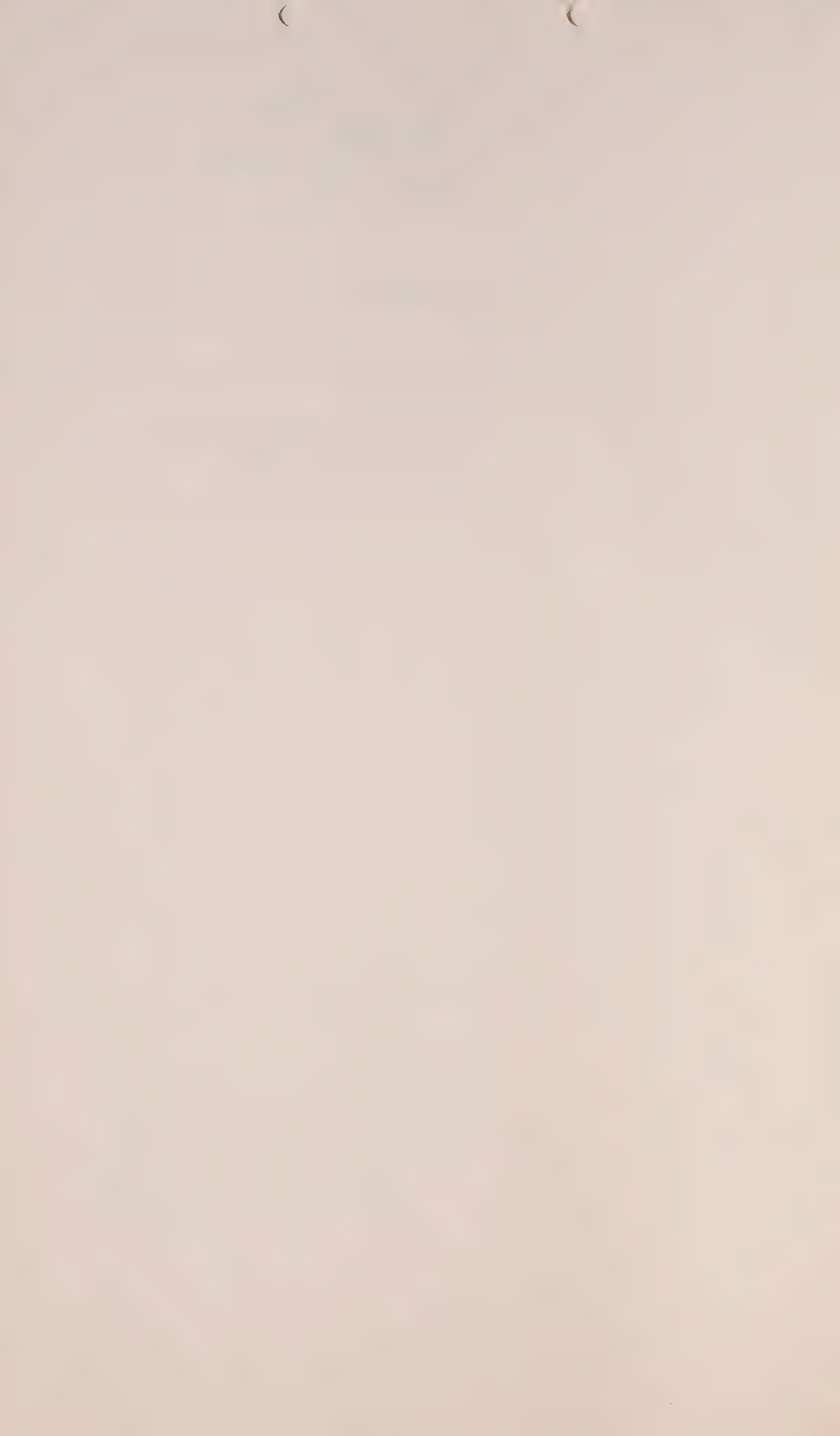
BROOK HEDGE



DAVID H. WHITE

Attorneys, Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for federal defendants



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	
_____)	

FEDERAL DEFENDANTS' JURY INSTRUCTION NO. 1

Plaintiffs in this case seek money damages for the defendants' alleged violations of their constitutional rights. Defendants deny that they acted unlawfully or that their acts caused any legal injury to these plaintiffs. During your deliberations you must decide which if any claims plaintiffs have established by a preponderance of the evidence against these defendants. Only if you find liability may you consider the question of money damages.

FEDERAL DEFENDANTS' JURY INSTRUCTION NO. 2

Standardized Civil Jury Instruction for the District of
Columbia 2-1 (Evidence in the Case)

FEDERAL DEFENDANTS' JURY INSTRUCTION NO. 3

Standardized Civil Jury Instruction for the District of
Columbia 1-10 (Sympathy, prejudice, passion)

FEDERAL DEFENDANTS' JURY INSTRUCTION NO. 4

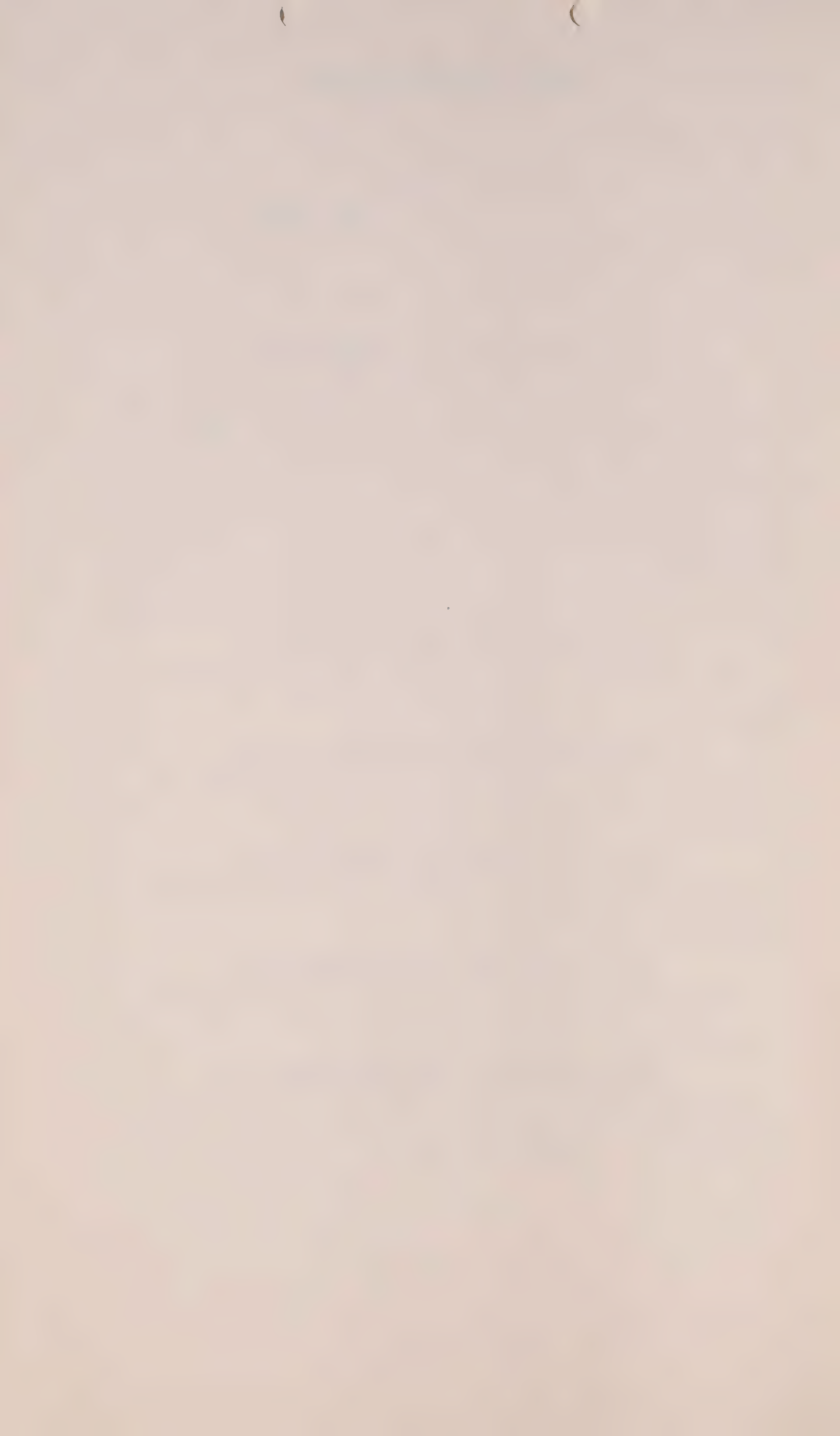
Standardized Civil Jury Instruction for the District of
Columbia 1-1 (Function of the Court)

FEDERAL DEFENDANTS' JURY INSTRUCTION NO. 5

Standardized Civil Jury Instruction for the District of
Columbia 1-2 (Function of the Jury)

FEDERAL DEFENDANTS' JURY INSTRUCTION NO. 6

Standardized Civil Jury Instruction for the District of
Columbia 2-8 (Burden of Proof)



ELEMENT OF INTENT NECESSARY TO
SUPPORT LIABILITY

Plaintiffs allege that the defendants acted willfully with the intention of violating the plaintiffs' constitutional and civil rights. An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids -- that is to say, with bad purpose either to disobey or to disregard the law.^{1/} It is not enough that a person intends to perform a particular act; in order for you to find that a defendant acted willfully, you must find that he acted with the intention of producing any harm that ensued from his act.^{2/} "Harm in this sense implies a loss or detrimental consequence to the plaintiff which in fact impairs his physical or financial well-being or other legally recognized interest.^{3/} A person is treated as intending the consequences of his act if it is shown that he knew or believed that those consequences were certain, or substantially certain, to result from his act.^{2/} If you find from a preponderance of the evidence that the defendants acted with a bad purpose either to disobey or to disregard the law with the intention of producing harm for the plaintiff, then you may find that the defendants acted willfully in the circumstances.

1/ Crowe v. Lucas, 595 F.2d 985, 990 (5th Cir. 1979);
Beard v. Mitchell, 604 F.2d 485, 495 (7th Cir. 1979).

2/ Restatement (Second) of Torts §870, Comment b.

3/ Restatement (Second) of Torts §7, Comment b.



FIRST AMENDMENT CLAIM

Plaintiffs claim that the defendants' actions with respect to them violated their rights of free speech and association. These are rights protected by the First Amendment to the Constitution. They are not absolute or unqualified rights; rather, they are rights that are subordinate to society's elemental need to maintain social order.^{1/} Consequently they are required to yield when governmental officials act in order to implement lawful and necessary governmental purposes, and the First Amendment is not violated even though governmental action inhibits or has an adverse impact on a citizen's exercise of his rights of speech, petition, or assembly.^{2/} Closely related to these precepts is the principle that the First Amendment does not protect unlawful conduct, even when that conduct is claimed to be political expression.^{3/} Thus no citizen or group of citizens may immunize themselves from good faith investigations simply because they are engaged in political expression or activity of some form.^{4/}

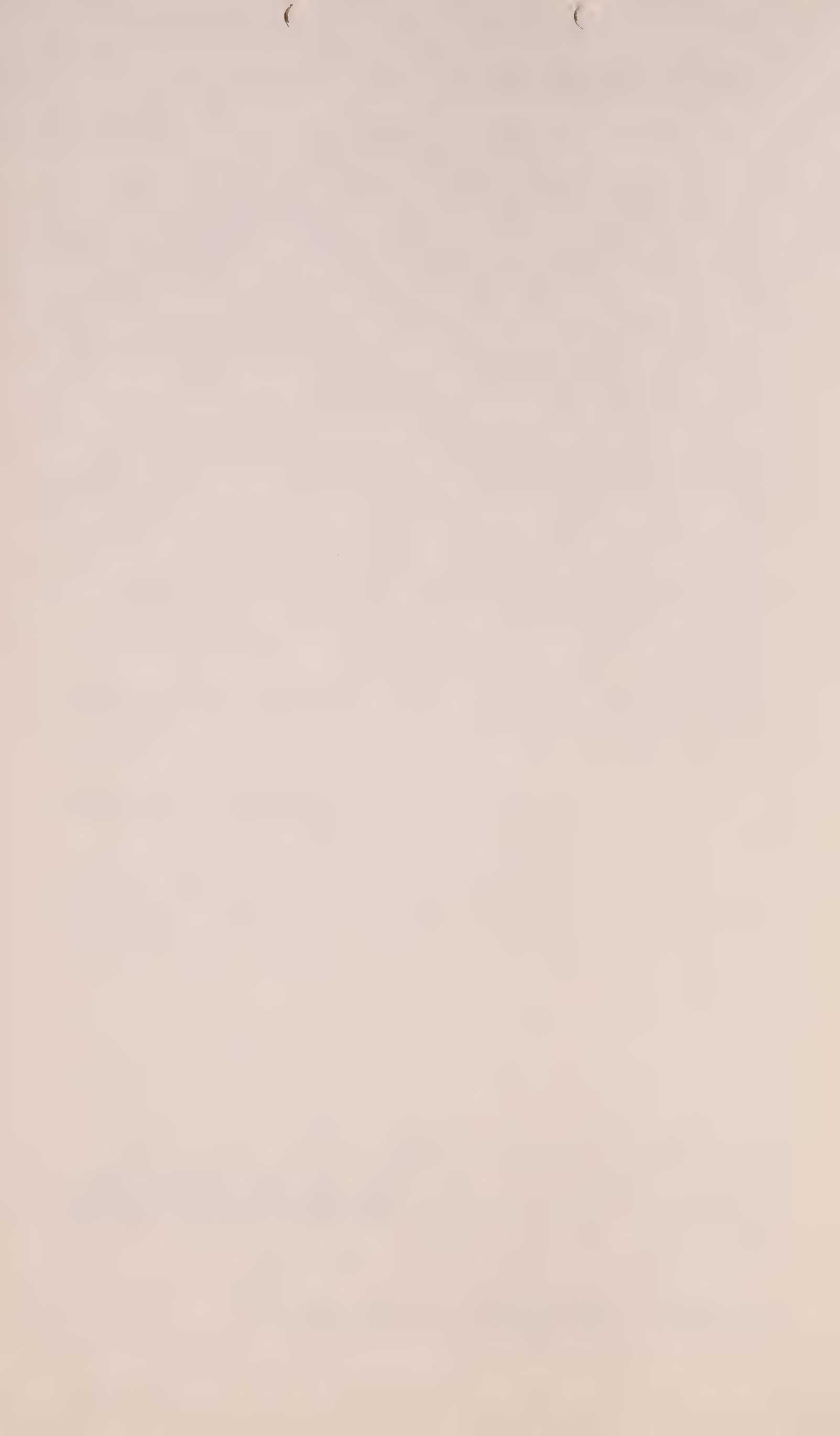
With these principles in mind, you should examine the evidence which has been presented to you and determine whether, by a preponderance of that evidence, each plaintiff has proven that the defendants in fact abridged or her speech on a specific occasion or foreclosed his or her association with others at a particular time and place.

1 / United Public Workers v. Mitchell, 330 U.S. 75, 95 (1947).

2 / Greer v. Spock. 424 U.S. 828 (1976); California Bankers Assoc. v. Shultz, 416 U.S. 21, 56 (1974); Reporters Committee for Freedom of the Press v. American Telephone and Telegraph Co., 593 F.2d 1030, 1052 D.C. Cir. 1978).

3 / United States v. O'Brien, 391 U.S. 368 (1968).

4 / Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Reporters Committee. supra, 593 F.2d at 1051.



FIFTH AMENDMENT CLAIMS

Plaintiffs claim that the defendants' actions denied them the protections of the Fifth Amendment to the Constitution, which provide that no person shall be deprived of life, liberty, or property without due process of law. Of these protected interests, only liberty and property are at issue in this case, for this case implicates no deprivation of life. The liberty interest raised by the plaintiff here is not that of physical freedom from restraint or confinement, but rather an intangible liberty interest that is given recognition under the Constitution in terms that I will shortly describe to you. As for the phrase, "due process of law," that refers to the fundamental requirement that a person shall be given notice and an opportunity to be heard to challenge or correct the record where the Government actually deprives a person of recognized liberty or property rights.¹/ In this case whether the plaintiff was given adequate due process is not at issue. The question for you to decide is whether as a matter of fact any particular actions by the defendants deprived the plaintiff of a liberty or property interest that the Constitution recognizes.

You are all familiar in various ways in your daily lives with the notion of property. The law defines property as ownership, the unrestricted and exclusive right to a thing, the right to dispose of it in every legal way, and the right to possess it, use it and to exclude everyone else from interfering with it.²/ An

¹/ Parratt v. Taylor, 49 U.S.L.W. 4509, 4512 (U.S. May 18, 1981); Carey v. Piphus, 435 U.S. 247 (1978); Bishop v. Tice, 622 F.2d 349, 353-58 (8th Cir. 1980).

²/ Black's Law Dictionary 1382 (4th ed. 1968).

individual must have a legitimate claim of entitlement to the thing claimed as property, whether it be tangible or intangible, and his claim must be recognized as a property right under particular federal or state law, for property derives not from a person's bare assertion of a claim to a thing, but from the recognition that the law gives to the claim.^{3/} You should therefore examine the evidence that has been presented and determine whether any plaintiff has proven by a preponderance of the evidence that he or she in fact had rights of property satisfying the definition that I have just given you and, if so, whether he or she has proven by a fair preponderance of the evidence that the defendants in fact deprived him or her of those recognized property rights. If you should reach that conclusion, then you may find that the defendants deprived the plaintiff of that identified property without due process of law. If you cannot make such a finding, then you must render a verdict for the defendants with respect to the plaintiff's property claim under the Fifth Amendment.

The Fifth Amendment also protects an intangible liberty interest related to a person's interest in his good name and reputation and protects against their disparagement in particular circumstances. To establish a deprivation of this constitutionally protected liberty interest by the defendants acting as Special Agents of the FBI the plaintiff must prove four elements by a preponderance of the evidence presented to you. First, the

^{3/} Paul v. Davis, 424 U.S. 693, 710 (1976); Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972).



plaintiff must prove that the defendants publicized information about the plaintiff that would not have otherwise been accessible to the public. In this regard, you are instructed that the disclosure or provision of allegedly derogatory or stigmatizing information about a person by law enforcement officers to other law enforcement or governmental agencies is not considered making the information public within the meaning of the Fifth Amendment's liberty provision.^{4/} Second, the plaintiff must prove by a preponderance of the evidence that the publicized information stigmatized him; that is, it called into question the plaintiff's good name, reputation, honor, or integrity.^{5/} You are instructed that mere unfavorable or critical information is not sufficient to meet this test; stigmatizing information is that which amounts to a charge of dishonesty, immorality, disloyalty, or habitual drunkenness so that the stigmatizing information operates as a badge of infamy.^{5/}

Third, the plaintiff must prove by a preponderance of the evidence that the publicized stigmatizing information was false.^{6/} In this regard you are to employ "false" in its everyday ordinary sense; that is, information that is deliberately and demonstrably untrue. Deviation from literal or scientific accuracy is not sufficient to render information false in the sense which you should apply here.^{7/} You are further instructed that where, as here, a plaintiff bases his claims on the Constitution, information is not considered to be false for purposes of determining whether the constitution has been violated when law enforcement officials obtain information from informants and they can show that the informant providing the information was reliable or that the information was confirmed by other sources.^{8/}

^{4/} Codd v. Velger, 429 U.S. 624, 628 (1977); Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate, 519 F.2d 1335, 1338 (3rd Cir. 1975); Gonzalez v. Leonard, 497 F.Supp. 1058 (D.Conn. 1980).

^{5/} Paul v. Davis, supra, 424 U.S. at 704-10; Wisconsin v. Constantineau, 400 U.S. 433, 436-37 (1971).

^{6/} Codd v. Velger, supra, 429 U.S. at 628; Gentile v. Wallen, 562 F.2d 193, 197 (2d Cir. 1977).

^{7/} Black's Law Dictionary 721 (4th ed. 1968).

^{8/} Aguilar v. Texas, 378 U.S. 108, 114 (1964); Jones v. United States, 362 U.S. 257, 261-71 (1960); United States v. Clements, 588 F.2d 1030, 1034 (5th Cir. 1979).

Fourth and finally, the plaintiff must prove by a preponderance of the evidence that the publicized false stigmatizing information was made public by the defendants concurrently or in direct conjunction with the loss of a right or status previously recognized under state law, such as employment, the privilege to operate an automobile or engage in an occupation or profession, or the possession of property.⁹/ The plaintiff may also meet this fourth requirement by proof that he was deprived of some other identified recognized and proven interest guaranteed by the Bill of Rights in the Constitution of the United States, such as guarantees afforded by the First and Fourth Amendments, under circumstances as outlined to you in previous instructions on those constitutional claims asserted by the plaintiff.¹⁰/

To recapitulate, if you find from a preponderance of the evidence that the defendants made public information about the plaintiff that was both stigmatizing in nature and false in content concurrently or in conjunction with their depriving him in fact of an interest recognized under state or federal law, such as property or employment, or that they in fact deprived him of a right recognized in the circumstances posed by this case as entitled to protection under the Bill of Rights of the Constitution, then you may find that the defendants deprived the plaintiff of a liberty interest protected by the Fifth Amendment of the Constitution. If you cannot make such a finding, then you must render a verdict for the defendants with respect to the plaintiff's Fifth Amendment liberty claim.

⁹/ Codd v. Velger, supra; Paul v. Davis, supra, 424 U.S. at 710; Moore v. Otero, 557 F.2d 435, 437 (5th Cir. 1977).

¹⁰/ Paul v. Davis, supra, 424 U.S. at 710 n. 5.



RELATIONSHIP BETWEEN DEFENDANTS'
ACTS AND INFORMANTS

You have heard testimony that FBI agents in the FBI's Washington Field Office employed informants to obtain information about plaintiffs and others who might have been of investigative interest to the FBI. Generally, an informant may not be considered as the employee or alter ego of the law enforcement officer who uses him.*/ Therefore in this case an informant's actions may not be attributed to any of the defendants in the absence of clear and convincing evidence that one of the defendants exercised continuous control over the day-to-day activities of the informant or specifically directed the informant to take a particular action.**/ You are further instructed that the use of informants by law enforcement personnel to obtain information is an accepted practice that does not in and of itself work a violation of constitutional or other legal rights, and you should attach no particular significance to the fact that the defendants utilized informants to develop information about the plaintiff.**/ You should therefore disregard evidence regarding informant activity toward the plaintiff unless there is a preponderance of the evidence that the informant's particular actions were (1) specifically directed or procured by one of the defendants and (2) were of such a nature that they violated the Constitution of the United States.

* / Slagle v. United States, 612 F.2d 1157, 1163 (9th Cir. 1980); cf. United States v. Orleans, 425 U.S. 807 (1976).

** / Weatherford v. Bursey, 429 U.S. 545, 557 (1977); United States v. Russell, 411 U.S. 423, 432 (1973); Socialist Workers Party v. Attorney General, 565 F.2d 19 (2d Cir. 1977).

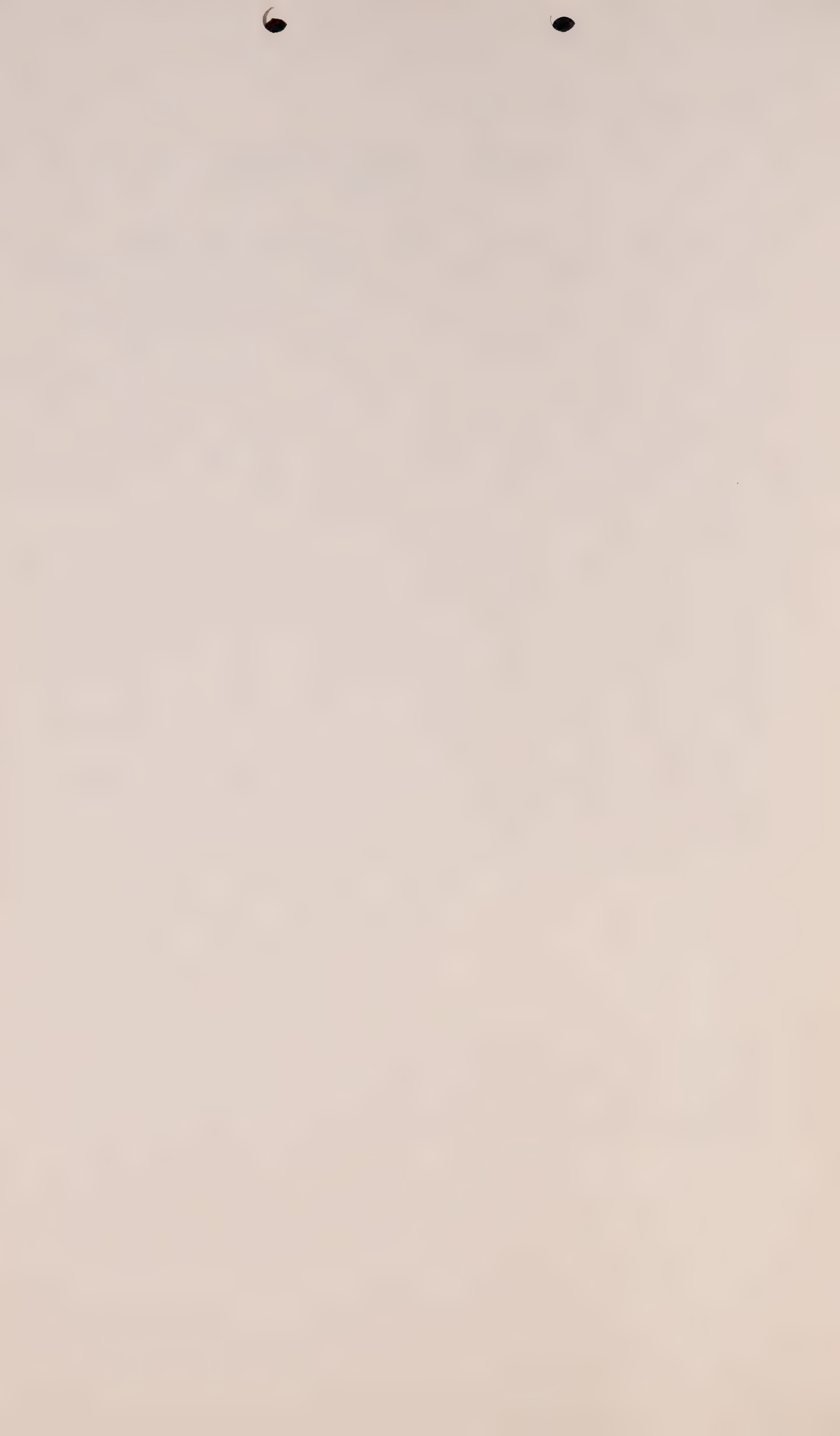
PLAINTIFF'S COGNIZABLE INTERESTS
(STANDING)

You are instructed that Sammie Abbott, Abe Bloom, David Eaton, Arthur Waskow, Tina Hobson, Richard Pollock, Reginald Booker, the Washington Peace Center, and the Washington Area Women Strike for Peace are the only plaintiffs in this case. No plaintiff represents the interests of any other person, including a spouse or any other member of the family. Similarly, no plaintiff represents the interests of the National Mobilization Committee, the Poor Peoples Campaign, the Institute for Policy Studies, or any other entity or organization with which any plaintiff may have been associated, and no plaintiff may base a claim on an injury to any other person or entity that he might have influenced or controlled. Consequently in order to find for any plaintiff based upon any assertion of wrong doing by any defendant, you may consider only acts that caused injury to a legally protected interest belonging solely to that plaintiff. You have been previously instructed regarding those interests and the protection to which they are entitled, and you are further instructed to keep this limiting principle in mind during your deliberations.

Rakas v. Illinois, 439 U.S. 128 (1979).

Warth v. Seldin, 422 U.S. 490 (1975).

Singleton v. Wulff, 428 U.S. 490 (1975).



Defendants' Instruction No. 14

PLAINTIFF'S CLAIM UNDER 42 U.S.C. §1985(3)

In this case plaintiffs also claim that the defendants' actions toward them entitle them to damages under one of the civil rights statutes enacted by Congress, the Third Subsection of Section 1985 of Title 42 of the United States Code. I have previously instructed you on the plaintiffs' claims for monetary relief based upon the Constitution, including the nature of the rights that they assert were violated and the proof which is necessary for them to establish a violation in fact which the law can recognize. Those instructions are important in connection with plaintiffs' claim for damages under the Act of Congress as well, as I shall explain to you shortly.

In order to establish that they are entitled to money damages from the defendants under Subsection three of Section 1985, plaintiffs have the burden of proving by a preponderance of the evidence each of the following elements:^{1/}

First, that the defendants entered into a conspiracy, that is, a common design or plan to do an unlawful act;

Second, that the defendants affirmatively acted to further their conspiracy;

Third, that the defendants acted with the purpose of depriving plaintiffs of the equal protection of the laws or of the fundamental rights of national citizenship;

Fourth, that the defendants act or acts pursuant to the conspiracy in fact injured the plaintiff in his person or property;

^{1/} Griffin v. Breckenridge, 403 U.S. 88 (1971); McLellan v. Mississippi Power and Light Co., 545 F.2d 919, 923 (5th Cir. 1977).



Fifth, that the defendants were motivated in their actions by racial or other discriminatory purpose.

A conspiracy is a design or plan formed by two or more persons for the purpose of accomplishing an unlawful purpose.^{3/} The plaintiff has the burden of proving the existence of an actual design or plan formulated by the defendants among themselves and only themselves.^{4/} You are instructed, as a matter of law, that where employees of a Government agency act in furtherance of that agency's official business, or where one employee follows a superior's instructions in furtherance of the agency's official business, they do not act as participants in a conspiracy.^{5/}

In addition to proving the existence of a conspiracy, plaintiffs must also establish by a preponderance of the evidence that the defendants carried it out by one or more overt acts which in fact interfered with plaintiffs' constitutional rights or deprived them of the equal protection of the laws. That is, the conspiracy as implemented must achieve the result of violating the law. I have previously instructed you with respect to the elements needed to prove that the defendants in fact interfered with plaintiffs' rights and you should apply those instructions in the same manner here in regard to the plaintiff's claim under the Civil Rights Act.

^{3/} Hampton v. Hanrahan, 600 F.2d 600, 620-21 (7th Cir. 1979); Hostrop v. Board of Jr. College District No. 515, 523 F.2d 569, 576 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976); Hoffman v. Halden, 268 F.2d 280, 295 (9th Cir. 1959).

^{4/} Simmons v. Zibilich, 542 F.2d 259 (5th Cir. 1976). Hill v. McClellan, 490 F.2d 859, 860 (5th Cir. 1974).

^{5/} Marsh v. Kitchen, 480 F.2d 1270, 1273 (2d Cir. 1973); Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), modified, 456 F.2d 835 (1972); compare with Hampton v. Hanrahan, *supra*, 600 F.2d at 624, alleging conspiracy between federal and state officials.



If you find by a preponderance of the evidence that all of the foregoing elements have been established and that the plaintiff suffered an injury in fact to his person or his property, then you may find that the plaintiff is entitled to relief in money damages under Subsection Three of Section 1985 of Title 42 of the United States Code.⁶/ If you cannot find that all five of the foregoing elements of a claim under the Act of Congress have been established, by a preponderance of the evidence, then you must render a verdict for the defendants.

⁶ / McLellan v. Mississippi Power and Light Co., supra, 545 F.2d at 923.



Defendant's Instruction No. 15

ACTS FOR WHICH A MEMBER OF A CONSPIRACY
MAY BE HELD LIABLE

I have previously defined the term, "conspiracy", for you as it should be applied in this case. Should you find from a preponderance of the evidence that a conspiracy existed among two or more of the defendants, as the plaintiffs have alleged, then you must next decide which acts a defendant is responsible for. Under the law, defendants are not liable to a plaintiff solely because they agreed to further an unlawful purpose, thereby joining in a conspiracy. They are not liable unless one of the conspirators actually acted within the scope of the conspiracy and in furtherance of its purpose to injure the plaintiff.* /

In order for you to find a defendant responsible for some act of another alleged participant in the conspiracy, the plaintiff must establish by a preponderance of the evidence the following points. First the evidence must establish that the other person was at the time he acted to injure the plaintiff a member of a conspiracy with the defendant. If the other actor was not a member of the same conspiracy with the defendant when he acted, the defendant is not responsible for the other person's actions.

Second, the evidence must establish that the other person's act was within the scope of the conspiracy and done in furtherance of its purpose. Plaintiffs have alleged that the purpose of the conspiracy they claim existed was to violate their constitutional rights. If you find that an action causing injury to the plaintiff was taken by another person not within the proven conspiracy, you may not hold a defendant responsible for it.

* / Fitzgerald v. Seamans, 384 F.Supp. 688, 693 (D.D.C. 1974), and authorities cited there. rev'd in part on other grounds, 553 F.2d. 220 (D.C. Cir. 1977).



Conspirators are responsible for the acts of other conspirators only if the acts are done in the furtherance of the joint venture as all understood it. They are not to be held for what some conspirator, unknown to the others, does beyond what was reasonably intended in the common understanding. Nor are they responsible for actions taken by others in what may have been a conspiracy among other people, but not a conspiracy in which the defendant participated.**/ In this regard, you are instructed that the mere fact that the federal and District of Columbia defendants were engaged in law enforcement work is not, standing alone, evidence of a conspiracy. To find a conspiracy between individual defendants or between groups of defendants, you must find by a preponderance of the evidence the existence of an agreement to do an unlawful act or a lawful act in an unlawful manner, and you must find that an overt act was committed in furtherance of the conspiracy which caused injury to the person or property of a plaintiff.

**/ Taxin v. Food Fair Stores, 287 F.2d 488, 451 (3rd Cir. 1961).



THE BAR OF LIMITATIONS
AND PROOF OF BASIS FOR TOLLING

The law requires that a plaintiff commence a lawsuit on certain types of claims within a prescribed period of time; otherwise, he is barred from maintaining the suit. The provision of law that embodies this requirement is called a statute of limitations. The purpose of a statute of limitations is to protect courts from trying stale claims and defendants from being called upon to defend them, where, through the passage of time, witnesses' memories have faded and evidence has become lost before it can be presented in court.^{1/} In this case the governing limitation period is three years.

The acts that the plaintiffs have based their suit on occurred in 1969 to 1971. Because the injuries for which the plaintiffs seek relief in money damages were either known to them when they happened or were knowable as a matter of human experience, as opposed to injuries that are hidden or delayed in their nature, the law provides that the period within which suit may be filed started to run when the defendants' acts on which they base this lawsuit occurred.^{2/} Plaintiffs filed this suit on July 16, 1976, more than three years after any of the acts they complain of took place and more than two years after the period of limitations had expired. This lawsuit is therefore barred by expiration of the statutory

^{1/} Burnet v. New York Central R. Co., 380 U.S. 424, 428 (1965); Chase Securities Corp., v. Donaldson, 325 U.S. 304, 314 (1945).

^{2/} Donaldson v. O'Connor, 493 F.2d 507, 529 (5th Cir. 1974), vacated and remanded on other grounds sub nom. O'Connor v. Donaldson, 422 U.S. 563 (1975); Mendiola v. United States, 401 F.2d 695, 697 (5th Cir. 1968); United States v. Reid, 251 F.2d 691 (5th Cir. 1958); Clark v. United States, 481 F.Supp. 1086, 1094-95 (S.D.N.Y. 1979); Cole v. Kelley, 438 F.Supp. 129, 138 (S.D. Cal. 1977); Wilson v. Retail Credit Co., 325 F.Supp. 460 (S.D. Miss. 1971), aff'd, 457 F.2d 1406 (5th Cir. 1972) (en banc).

period of limitations for commencing suit unless the plaintiff can establish, by a preponderance of the evidence, that the running of time established by the governing period of limitations was "tolled" or suspended until July 16, 1973, or later, that is, within the three year period prior to the filing of this action.

To avoid the effect of the statute of limitations, each plaintiff has the burden of establishing two elements. First, each must show that until July 16, 1973, or later, defendants successfully concealed facts that, if known, would have been sufficient to put him on notice that he had the basis of a legal claim or a potential claim. What is meant here by the phrase, "basis of a claim," is not knowledge of all the facts that make up a legal cause of action, but rather that quantum of information which should alert a plaintiff that his rights have been invaded.^{4/} Second, he must establish that fraudulent means were used by the defendants to achieve that concealment.^{4/}

With regard to the first element, you are instructed that successful concealment occurs where a plaintiff, despite his best efforts and due diligence, objectively cannot learn the basis of his claim or even sufficient information to put him on notice that he should investigate further to learn whether he possibly had the basis of a claim. In this case such information would be that which indicated or suggested that agents of the Federal Bureau of Investigation obtained information about him through various forms of surveillance, disseminated information about him to others, or took action to interfere with his rights of speech or association.

The law does not permit a plaintiff, once alerted that he has a potential claim, to wait for the facts to develop or emerge.^{4/} You are instructed that the means or availability of knowledge are ordinarily equivalent in law to knowledge itself,^{5/} and in this connection you should consider evidence of plaintiff's suspicions at the time, information about FBI actions toward him which he

^{3/} Zenith Radio Corp., v. Hazeltine Research, Inc., 401 U.S. 321, 334 (1971); Fitzgerald v. Seamoni, 384 F.Supp. 688 (D.D.C. 1974).

^{4/} Fitzgerald v. Seamoni, supra.

^{5/} Fifth Circuit District Judges Association, Pattern Jury Instructions, Civil Cases, Special Instruction No. 5.

personally received prior to July 16, 1973, information which was available to the public at large through the press, and the availability of information from Government agencies through the Freedom of Information Act, which became effective on July 4, 1967.

If you find that each plaintiff has met his burden of establishing that he neither knew nor through the exercise of due diligence could have known prior to July 16, 1973, that he had a potential claim against one or more employees of the Federal Bureau of Investigation, whether or not they were personally identified,^{6/} then you may find that information comprising the basis of suit was successfully concealed from him. On the other hand, if you find that the plaintiff knew, was alerted, or had the means through diligent inquiry of learning that he had a potential claim, even though the FBI employees were not personally identified,^{6/} then you must find that the basis of the suit was not successfully concealed from him.

If you find that concealment occurred, you must then determine whether fraudulent means were used by the defendants to effect the concealment. You are instructed that fraudulent concealment occurs where a party suppresses something which he has a duty to disclose or engages in a deliberate and affirmative act to prevent disclosure.^{7/} A duty to disclose can arise from a contract or agreement between the parties, by operation of an act of Congress or a state legislature, or through the existence of a fiduciary relationship between the parties. Some examples of a fiduciary relationship are those between doctor and patient, lawyer and client, and trustee and ward. You are instructed that in the absence of proof of a fiduciary relationship between the plaintiff and the defendants, or in the absence of some other affirmative duty in the defendants to disclose, mere silence by the defendants and

^{6/} Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

^{7/} Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979).



and mere failure to disclose the basis of a claim does not constitute fraudulent concealment.^{8/} Likewise, if you find here that the defendants concealed their actions from the plaintiff, but that the evidence establishes that they had a duty or responsibility as Special Agents of the Federal Bureau of Investigation to maintain the confidentiality of information in FBI files as an aspect of their employment, then you are instructed that such concealment as occurred was not fraudulent in nature. In either eventuality, you must conclude that fraudulent means were not used by the defendants to conceal the basis of the plaintiffs' claims from them and that this lawsuit is time-barred.

On the other hand, if you have found that each plaintiff established by a preponderance of the evidence that until July 16, 1973, or later, the defendants successfully concealed the basis of his claims from him, and the plaintiff has also established by a preponderance of the evidence that the defendants concealed their actions from the plaintiff for some reason unrelated to their duties and responsibilities as Special Agents of the Federal Bureau of Investigation, then you may find that their concealment of the basis of plaintiff's claims was fraudulent in nature. In that eventuality, you should find that the plaintiff has met his burden for tolling or suspending the running of time as to the period of limitations, and that his suit was timely commenced.

^{8/} Smith v. Nixon, supra; General Aircraft Corp. v. Air America, Inc., 482 F.Supp. 3, 8 (D.D.C. 1979).

MULTIPLE DEFENDANTS

Although there are three defendants in this action, it does not follow from that fact alone that if one is liable, the others are liable. Each defendant is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against the other.^{1/}

Furthermore, the fact that a subordinate of a defendant committed an act which injured a plaintiff or violated a plaintiff's rights does not constitute sufficient evidence to find the defendant liable. To find a defendant, who at the time was a Government officer, personally liable, you must find by a preponderance of the evidence that he personally participated in, directed, or personally supervised the act which caused injury to the plaintiff.^{2/}

In addition, each defendant is entitled to be judged only on the evidence that has been admitted against him. If, during the presentation of the evidence, I instructed you that some evidence was admissible against one or two of the defendants, but not against all of them, it is your duty now to abide by those instructions. If I have told you that evidence or testimony is not admissible against one of the defendants, you must disregard it completely during your consideration of whether or not to return a verdict against that defendant.^{3/}

^{1/} Devitt and Blackmar \$71.07.

^{2/} Lander v. Morton, 518 F.2d 1084, 1087 (D.C.Cir. 1976); Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976).

^{3/} Rizzo v. Goode, 423 U.S. 362 (1976); Tileston v. Ullman, 318 U.S. 44 (1943); Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969); Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976).



DEFENDANTS' QUALIFIED IMMUNITY DEFENSE

You need consider this instruction which I am about to give you only in the event that you find that one or more of the defendants violated one or more of the plaintiffs' claims based upon the Constitution or upon subsection three of Section 1985 of Title 42 in the United States Code. Under the law, a federal official is not liable for payment of money damages in a case such as this one for his actions done as part of his official responsibilities and duties where he shows that he was acting in good faith and reasonable grounds support that belief.^{1/} The purpose of this rule is to protect federal officials from being held liable for mere mistakes of judgment and to promote the public interest in having them to carry out their responsibilities vigorously and decisively without the fear of being held liable in damages if they are later found to have erred.^{2/}

This protection for federal officials against being held liable to pay money damages for violation of constitutional or federal statutory rights is called qualified immunity. In order to have its protection, it is the burden of each defendant to show by a preponderance of the evidence that he is entitled to it. But, as I have said, you are to decide whether a defendant has established his entitlement to this immunity only if you have already concluded that he has done an act which, under the other instructions that I have given you, would make him liable. You should consider and decide a defendant's entitlement to this immunity only in relation to the act or acts which you have previously found to support a finding of liability for any of the plaintiffs' claims.

^{1/} Butz v. Economou, 438 U.S. 478, 506-508 (1978); Dilmore v. Stubbs, 636 F.2d 966, 968-69 (5th Cir.); McNamara v. Moody, 606 F.2d 621, 625 (5th Cir. 1979); Reimer v. Short, 578 F.2d 621, 626 (5th Cir. 1978); Bryan v. Jones, 530 F.2d 1210, 1213-14 (5th Cir. 1976).

^{2/} Butz v. Economou, supra; Procunier v. Navarette, 434 U.S. 555, 562 (1978); Cruz v. Beto, 603 F.2d 1178, 1182-83 (1979).

There are three elements to the qualified immunity defense. First, the defendant must establish that the actions for which he has been sued for damages were within the scope of his official duties or within the outer perimeter of his authority. What is meant by this phrase is that the officer must have been acting in his role as a Government employee, and the acts complained of had more or less connection with the general matters for which he was responsible.^{3/} So long as a given act or function of the defendant was in fact within the scope of his duties or authority, it is within that scope for purposes of his immunity defense, even though he might have violated a right of the plaintiff's.

The second element of the qualified immunity defense requires the defendant to establish that he indeed believed in good faith that his actions were lawful at the time he acted. A defendant satisfies this element by establishing through a preponderance of the evidence that he sincerely believed that he was acting within the sphere of his official responsibilities and that he in fact had no knowledge that a constitutional or other violation of the law would result from his action.^{4/} Government officials such as these Special Agents of the FBI can also satisfy this element of this defense by establishing that in their actions they abided by FBI regulations and established practices.^{5/} Should you find from a preponderance of the evidence regarding the points I have just described to you that a defendant had a good faith belief in the lawfulness of his actions at the time that he acted, then you may find that he in fact acted in good faith in the circumstances of this case.

^{3/} Slavin v. Curry, 574 F.2d 1256, 1265-66 (5th Cir. 1978). G.M. Leasing Corp., v. United States, 560 F.2d 1011, 1015 (10th Cir. 1977); Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 456 F.2d 1339, 1345 (2d Cir. 1972); Norton v. McShane, 332 F.2d 855, 861-62 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965).

^{4/} Procunier v. Navarette, supra, 434 U.S. at 571 (Stevens, J., dissenting); Vasquez v. Snow, 616 F.2d 217, 220 (5th Cir. 1980); Cruz v. Beto, supra, 603 F.2d at 1182-83; Crowe v. Lucas, 595 F.2d 985, 990 (5th Cir. 1979); Jetson Mfg. Co., v. Murphy, 462 F. Supp. 807, 811 (M.D. Pa. 1978).

^{5/} Procunier v. Navarette, supra, Cruz v. Beto, supra; Reimer v. Short, supra, 578 F.2d at 627; Slavin v. Curry, supra; Bryan v. Jones, supra, 530 F.2d at 1215; Mark v. Groff, 521 F.2d 1376, 1376, 1376, 1380-81 (9th Cir. 1975).



The third element of the qualified immunity defense requires the defendant Government officer to establish that it was reasonable in the circumstances in which he acted that he did not know that his actions would violate the plaintiff's constitutional or statutory rights. The law recognizes that Government officials cannot be expected to predict the future course of constitutional law, and unless an officer acts in disregard of constitutional and statutory rights that were clearly established at the time he acted, or he knew in fact that he was violating the plaintiff's rights at the time he acted, he is considered from an objective standpoint to have acted in good faith.^{6/}

^{6/} Procunier v. Navarette, supra, 434 U.S. at 562; Dilmore v. Stubbs, supra, 636 F.2d at 969; McNamara v. Moody, supra, 606 F.2d at 625; Bogard v. Cook, 586 F.2d 399, 411 (5th Cir. 1978).



You may find for the plaintiff if, after making that determination, you also conclude from a preponderance of the evidence that the plaintiff has proven that the defendants themselves directly abridged the plaintiff's speech or association by means that were coercive, compulsory, or proscriptive in nature and which produced specific objective harm.^{5/} In making such finding you should take care to identify the occasion or occasions when and where such deprivation or abridgement occurred and, likewise, specify the harm to the plaintiff that was manifested.^{6/} Because the law does not recognize claims of First Amendment deprivations that are based on incidental or consequential effects of governmental actions, as, for example, when audiences or contributions decline through public disapproval after the government has designated a person or organization "dangerous" or "subversive", you should take care to distinguish between an incidental consequence of the defendants' actions and the essence of a direct deprivation of the plaintiff's actual exercise of his or her rights of speech and association.^{7/} Only the latter is given recognition as a deprivation that can support a claim for damages that is based on the First Amendment.

Should you find in accordance with these instructions that no plaintiff was in fact deprived of his or her rights under the First Amendment, then you must find for the defendants.

^{5/} Laird v. Tatum, 408 U.S. 1, 11-14 (1972); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 183-84 (1951) (Jackson, J., concurring); Reporters Committee for Freedom of the Press v. American Telephone and Telegraph Co., 593 F.2d 1030, 1052 (D.C. Cir. 1978).

^{6/} Laird v. Tatum, supra.

^{7/} O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 787-89 (1980); Martinez v. California, 444 U.S. 277, 281 and 285 (1980); Joint Ant-Fascist Refugee Committee, supra.



FOURTH AMENDMENT CLAIMS

Plaintiffs claim that the defendants' actions with respect to them violated the protections due them under the Fourth Amendment to the Constitution. The Fourth Amendment protects a citizen from an unreasonable search of his home or person or an unreasonable seizure of his person, his papers, or other possessions by Government agents.^{1/} A person is arrested or seized within the meaning of the Fourth Amendment when his physical freedom of movement is restrained by a show of authority or physical force; however, the Fourth Amendment is not violated when law enforcement officers briefly detain a person in connection with an apparent criminal violation or when they address questions to anyone on the streets without impeding his physical freedom of movement.^{2/}

As I previously mentioned, the Fourth Amendment protects against searches by Government agents that are unreasonable. There are searches that are considered reasonable as a matter of law -- that is, the Fourth Amendment is not violated Government agents observe or acquire information about a person even though he might not intend for them to acquire or learn that information. In this regard you are instructed that what a person discloses to others in a setting that can be directly observed by Government

^{1/} Bell v. Wolfish, 441 U.S. 520, 558-59 (1979); Chambers v. Maroney, 399 U.S. 42, 51-2 (1970); Brinegar v. United States, 338 U.S. 160, 174-77(1949).

^{2/} Michigan v. Summers, 49 U.S.L.W. 4776 (U.S. June 22, 1981); United States v. Mendenhall, 446 U.S. 544, 554-55 (1980).



agents is not protected by the Fourth Amendment -- that is, it is not a search within the meaning of the Fourth Amendment and no violation of that amendment has occurred.^{3/} Similarly, the Fourth Amendment is not violated where Government agents obtain information about a person through an informant or participant in a conversation or meeting which that person believed or intended to be private.^{4/} This rule applies whether the person misplaced his trust in a confidante or friend or he simply took a risk that what he said or did would not ultimately become known to others.^{4/}

If you find by a preponderance of the evidence that the plaintiff has proved that the defendants seized him personally under circumstances that, as I have outlined to you, would violate the Fourth Amendment's prohibition of unreasonable seizures, or that the defendants acquired information about the plaintiff in a manner that constituted an unreasonable search measured against the standards that I have just given you, then you may find for the plaintiff. If you cannot make such a finding, then you must render a verdict for the defendants with respect to the plaintiff's Fourth Amendment claims.

^{3/} United States v. Caceres, 440 U.S. 741 (1979); Katz v. United States, 389 U.S. 347, 351 (1967); Lewis v. United States, 385 U.S. 206, 210-11 (1966); United States v. Jackson, 588 F.2d 1046, 1052 (5th Cir. 1979).

^{4/} United States v. Caceres, *supra*; United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293, 302 (1966).



In determining whether a defendant acted with good faith that was reasonable in the circumstances at the time he acted, you must consider all the facts and surrounding circumstances known to him then, including whether the applicable law that the plaintiff claims was violated was in fact so clearly established at the time that the defendant reasonably should have known he was violating a constitutional or statutory protection at the time. You must particularly take care to avoid making a determination based on hindsight. Facts, circumstances, and legal doctrines which may have come to light at a time after the defendant acted obviously could not have been part of his surrounding circumstances when he acted. Therefore, such after-the-fact matters are not to be considered by you in judging whether it is reasonable to conclude that the defendant's acts were done in good faith. In this regard, you are instructed that federal officers such as the defendants here can not be held liable for mere mistakes in judgment, whether the mistake be one of fact or one of law.^{7/} Nor in deciding this element of a defendant's qualified immunity may you consider what a trained lawyer would or should have believed, but only what a person situated as the defendant himself would have or should have believed under the circumstances.^{8/}

If you find that a defendant has established each of the elements of the qualified immunity defense as I have given them to you here, then you should find that he is entitled to the protection of qualified immunity, and he may not be held liable for any of the plaintiff's claims that may have otherwise been established in this case.

7/ Butz v. Economou, supra, 438 U.S. at 507.

8/ Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977).



DEFENDANTS ENTITLED TO A PRESUMPTION
OF REGULARITY

As Special Agents for the Federal Bureau of Investigation, the defendants were required to follow all pertinent FBI policies, regulations, and rules. Unless outweighed by evidence in this case to the contrary, you may find that the official duties of these defendant officers had been regularly and properly performed and that in the performance of their duties they obeyed the law. In the event that you conclude that the defendants did not obey the law or follow FBI policies, regulations, and rules in effect at the time, you should give their failure to obey such weight as you determine it deserves in light of the surrounding circumstances.

Devitt and Blackmar \$15.04 (3d ed. 1977).

Beard v. Mitchell, 604 F.2d 485, 498 and n. 18 (7th Cir. 1979).



Defendants' Instruction No. 20

PERSONAL LIABILITY AND PAYMENT OF
JUDGMENT FROM PERSONAL ASSETS

Although the federal defendants in this case have been sued for acts done in the course of their employment as employees of the Federal Bureau of Investigation, any award of damages which you might make is payable only by them from their personal assets. Therefore in formulating an award of damages, you may not assume or treat this lawsuit as a suit against the United States or an agency of the United States Government. The plaintiff has sued the defendants personally, and consequently any damages awarded are to be paid by them personally.

Carlson v. Green, 446 U.S. 14, 18-21 (1980).

Biven v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

Meiners v. Moriarity, 563 F.2d 343, 349-50 (7th Cir. 1977).



DAMAGES -- CAUSATION REQUIREMENT

The purpose of awarding money damages to a plaintiff who has established the liability of a defendant for having committed particular acts is to compensate him for the harm which he actually experienced that flowed as a direct and natural consequence of those acts. Therefore in awarding damages for any injury that the plaintiff may have suffered as a result of a defendant's acts, you should not award damages for any injury or condition which the plaintiff may have suffered unless it has been established by a preponderance of the evidence that the defendant's act or acts were the legal cause of that injury. Proof that an event happened or that a certain result could possibly have been caused by a past event, without proof of a defendant's action being the legal cause, is not sufficient as a basis for awarding damages.^{*/}

Restatement (Second) of Torts, §904, Comment A. Devitt and Blackmar §85.09 (3d ed - 1977).

^{*/} Chevron Oil Co. v. Snellgrove, 175 So.2d 471, 473 (Miss. 1965).



ELEMENTS OF DAMAGE

The purpose of awarding money damages is to compensate the plaintiff for the harm which he has actually suffered. With that in mind, you should consider the following elements of damage, to the extent you find they have been proved by a preponderance of the evidence:^{1/}

1. As to false stigmatizing information that a defendant caused to be made public, you should consider the degree or seriousness of contempt, ridicule, or hatred in the community which such information would reasonably bring upon a person similarly situated as the plaintiff then. You should likewise assess as to time and degree the extent to which that stigma caused him to be shunned, avoided or ostracized and the particular circumstances in which that harm manifested itself in any incident proven by the plaintiff.

^{1/} These elements of damage are based upon claimed injuries as set forth in Plaintiff's Summary of Ultimate Facts and Contested Issues, ¶21, affixed as Appendix 1 to the Proposed Draft Joint Pretrial Order which has been submitted to the Court.



2. As to any proven fear, mental distress, humiliation, or loss of reputation that was in fact suffered by the plaintiff, you should consider the intensity and duration of such harm and whether or not any physical manifestations accompanied it at the time. In weighing the severity of these injuries, you should also consider whether or not the plaintiff sought medical care, psychiatric care, or other professional counseling.

In reaching a determination of what you conclude to be adequate compensation for the harm that the plaintiff has in fact suffered, you are instructed that you should give no consideration whatsoever to the expenses of this litigation to the plaintiff nor to the effect of taxes on your award. That is to say, you should neither increase nor decrease an award because of taxes or the expense of litigation; each must be completely excluded from your deliberations. Any award you make should, insofar as possible, should reasonably compensate the plaintiff for the harm that he actually suffered as proven to you through a preponderance of the evidence in this case.

Restatement (Second) of Torts, 905, 906, 912, 914, 914-A.
Devitt and Blackmar §§85.05, 85.08 (3d ed. 1977).



Defendants' Instruction No. 24

NOMINAL DAMAGES

If you find that the plaintiff is entitled to a verdict in accordance with these instructions because the defendants violated one or more of his constitutional rights but at the same time you do not find that he suffered harm or injury in fact to support an award of compensatory damages, then you should return a verdict awarding the plaintiff the nominal sum of one dollar or less.

Carey v. Piphus, 435 U.S. 247, 266-67 (1978).

Familias Unidas v. Briscoe, 619 F.2d 391, 402 (5th Cir. 1980).

Devitt and Blackmar §85.15 (3d ed. 1977).

Restatement (Second) of Torts §907

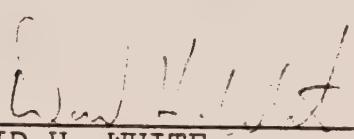
Federal defendants reserve the right to modify the foregoing proposed instructions or to offer additional instructions as necessitated by the evidence presented at trial

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F. C. RUFF
United States Attorney


BROOK HEDGE


DAVID H. WHITE

Attorneys, Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for federal defendants



CERTIFICATE OF SERVICE

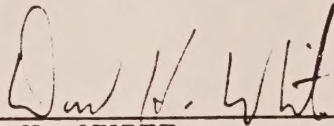
I hereby certify that on this 6th day of November, 1981, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Federal Defendants' Pretrial Brief And Proposed Voir Dire, Jury Instructions, and Verdict Form.

Herb Semmel, Esquire
Urban Law Institute for the
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009

Anne Pilsbury, Esquire
17 Danforth Street
Norway, Maine 04268

Laura Bonn, Esquire
Assistant Corporation Counsel
District Building
14th and E Streets, N.W.
Washington, D.C. 20004

Daniel Schember, Esquire
Gaffney, Anspach, Schember,
Klimasky & Marks, P.C.
1712 N Streets, N.W.
Washington, D.C. 20036



DAVID H. WHITE
Attorney, Department of Justice
Washington, D.C. 20530

ACCOPRESS®

19021	BLACK
19022	LIGHT BLUE
19024	LIGHT GRAY
19025	LIGHT GREEN
19028	RED

GENUINE PRESSBOARD

ACCO INTERNATIONAL INC.
CHICAGO, ILLINOIS 60619

